

“NECESSARY AND PROPER” AND “CRUEL AND UNUSUAL”:
HENDIADYS IN THE CONSTITUTION

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INTRODUCTION.....	688
I. HOW HENDIADYS WORKS.....	695
II. “CRUEL AND UNUSUAL”	706
A. <i>The Modern Trend to Read the Terms as Separate Requirements</i>	706
B. <i>Textual Difficulties with Reading the Terms as Separate Requirements</i>	709
C. <i>Reading “Cruel and Unusual” as a Hendiadys</i>	712
III. “NECESSARY AND PROPER”	720
A. <i>The Modern Trend to Read the Terms as Separate Requirements</i>	720
B. <i>Revisiting the Evidence for Two Requirements</i>	726
C. <i>Reading “Necessary and Proper” as a Hendiadys</i>	732
D. <i>New Light on Three Puzzles</i>	740
E. <i>How Many Things Is It Proper for “Proper” To Do?</i>	746
F. <i>Implications for Judicial Enforcement</i>	751
G. <i>Testing the Hypothesis: Two Case Studies from Marshall’s Defense of McCulloch</i>	757
CONCLUSION	761

“Unfortunately, no one, including the constitutional framers, knows the point of the phrase ‘necessary and proper.’”¹

“Those who object to the [Necessary and Proper Clause] as a part of the Constitution, . . . have they considered whether a better form could have been substituted?”²

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¹ Mark A. Graber, *Unnecessary and Unintelligible*, 12 Const. Comment. 167, 168 (1995).

² The Federalist No. 44, at 299, 303 (James Madison) (Jacob E. Cooke ed., 1961).

INTRODUCTION

FOR more than two centuries, no clause of the U.S. Constitution has been more central to debates over federal power than the Necessary and Proper Clause.³ For an interpreter today, it is inevitable to wonder if everything worth saying has already been said. Yet the Clause remains at the heart of major debates in this country, including the recent landmark case of *National Federation of Independent Business v. Sebelius*.⁴ In that case the Court eventually got around to upholding the Affordable Care Act under the taxing power, but only after holding that the individual mandate could not be justified under the Necessary and Proper Clause. The individual mandate, the Chief Justice wrote, might be “‘necessary’ to the Act’s insurance reforms,” but it was “not a ‘proper’ means for making those reforms effective.”⁵ Necessary, but not proper. Whether the conclusion was right or not, it was exactly the kind of close reading that one would expect a court to give to the Clause, since it authorizes only congressional actions that are “necessary *and* proper.”⁶ Or does it?

This Article attempts to shed new light on the original meaning of the Necessary and Proper Clause, and also on another Clause of the U.S. Constitution, the Cruel and Unusual Punishments Clause. The phrases “necessary and proper” and “cruel and unusual” can be read as instances of an old but now largely forgotten figure of speech. That figure is *hendiadys*, in which two terms separated by a conjunction work together as a single complex expression.⁷ The two terms in a hendiadys are not syn-

³ See, e.g., David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829*, at 250–58 (2001) (First and Second Banks of the United States); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795, 807–11 (1996) (New Deal); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 *Harv. L. Rev.* 1, 30–42 (2014) (Rehnquist and Roberts Courts).

⁴ 132 S. Ct. 2566 (2012).

⁵ *Id.* at 2592.

⁶ See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 271–72 (1993); see also Jack M. Balkin, *Living Originalism* 179 (2011); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116–17 (2012).

⁷ *Hendiadys* is defined by the Oxford English Dictionary as: “A figure of speech in which a single complex idea is expressed by two words connected by a conjunction; e.g. by two substantives with *and* instead of an adjective and substantive.” *Hendiadys*, 7 *The Oxford English Dictionary* 142 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1991). In English it has also been spelled *endiadis*, *hendiadis*, and *hendiadis*, and has been called “the figure of

onymous, and when put together their meanings are melded. (Hendiadys is pronounced *hen-DIE-u-dus*.)

This figure can be found in many languages and registers of speech. It is widespread, for example, in colloquial English. If a farmer says that his cow is “*nice and fat*,” he is not praising two qualities of the cow—niceness and, separately, fatness—but rather expressing that the cow is nicely fat, quite fat. Or, to use the standard example from Latin poetry, when Virgil writes “we drink from *cups and gold*,” he does not mean drinking from two things, but from one: golden cups.⁸ Other uses of hendiadys are more complex than simple modification of one term by another. Sometimes there is a reciprocity where each term in the hendiadys modifies the other. Sometimes the individual terms are dissolved and replaced by something new, with each term contributing to the meaning of this new whole.⁹ In all these various uses, hendiadys is not mere duplication, such as “cease and desist.”¹⁰ Rather it is two terms, not fully synonymous, that together work as a single unit of meaning. It is distinct from a term of art; hendiadys does not require an established technical meaning.¹¹

This Article explains what hendiadys is, what it does, and how it can help us understand the Necessary and Proper Clause and the Cruel and Unusual Punishments Clause.¹² The argument here is not that “necessary and proper” and “cruel and unusual” must each be read as a hendiadys. Rather, the argument is that these phrases may be persuasively read that way, and that doing so solves puzzles that have long perplexed courts and commentators.

Twynnes.” See, e.g., George Puttenham, *The Arte of English Poesie* 177–78 (Gladys Doidge Willcock & Alice Walker eds., Cambridge Univ. Press 1936) (1589).

⁸ David Sansone, *On Hendiadys in Greek*, 62 *Glotta* 16, 19 & n.10 (1984); George T. Wright, *Hendiadys and Hamlet*, 96 *PMLA* 168, 168 (1981).

⁹ E.g., William Shakespeare, *Hamlet* act 1, sc. 3, l. 9, at 42 (Susanne L. Wofford ed., 1994) (“*The perfume and suppliance of a minute*”). For exposition, see *infra* text accompanying note 109.

¹⁰ On “cease and desist,” see *infra* note 90 and accompanying text.

¹¹ On terms of art and hendiadys, see *infra* note 34 and notes 92–93 and accompanying text.

¹² There may be other instances of hendiadys in the U.S. Constitution, and phrases worth considering include “Piracies and Felonies,” U.S. Const. art. I, § 8, cl. 10; “Powers and Duties,” U.S. Const. art. II, § 1, cl. 6; “Advice and Consent,” U.S. Const. art. II, § 2, cl. 2; “necessary and expedient,” U.S. Const. art. II, § 3; “keep and bear,” U.S. Const. amend. II; and “searches and seizures,” U.S. Const. amend. IV.

First consider “cruel and unusual.” These are often understood as two separate requirements: punishments are prohibited only if they are cruel *and* unusual.¹³ Yet this phrase can easily be read as a hendiadys in which the second term in effect modifies the first: “cruel and unusual” would mean “unusually cruel.” When this reading is combined with the work of Professor John Stinneford, which shows that “unusual” was used at the Founding as a term of art for “contrary to long usage,”¹⁴ it suggests that the Clause prohibits punishments that are innovatively cruel. In other words, the Clause is not a prohibition on punishments that merely happen to be both cruel and innovative. It is a prohibition on punishments that are innovative *in their cruelty*.

This reading has an elegant simplicity. It solves textual puzzles about how “cruel” and “unusual” work together.¹⁵ It also suits the evidence, sparse as it is, that the purpose of the Clause was not to constrain existing punishments, but rather to constrain punishments that might be invented in the future.¹⁶ Furthermore, this reading can lead to an inquiry that is more amenable to judicial resolution. Judges need not determine the quantum of cruelty that is constitutionally permissible (as in other readings); they need only make a comparative determination about whether a punishment is innovative in its cruelty.¹⁷

Next consider “necessary and proper.” Article I enumerates the powers of Congress, and the Necessary and Proper Clause affirms that Congress has not only its enumerated powers but also the incidental powers that are necessary for executing those powers.¹⁸ In other words, for its

¹³ See *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting); *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.); *In re Kemmler*, 136 U.S. 436, 447 (1890); Scalia & Garner, *supra* note 6, at 116; David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 Pub. Aff. Q. 77 (2002); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?*, 87 Wash. U. L. Rev. 567 (2010).

¹⁴ John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008).

¹⁵ See *infra* Section II.B.

¹⁶ See Hershenov, *supra* note 13; Stinneford, *supra* note 14.

¹⁷ Accord Stinneford, *supra* note 14, at 1745. Professor Stinneford’s reading of the entire phrase, however, differs from the one in this Article. See John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 972 (2011) (“If a punishment is found to be unusual, the next question is whether it is cruel.”). The comparative-inquiry advantage depends on the meaning given to “cruel.”

¹⁸ On incidental powers and the Necessary and Proper Clause, see Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, *The Origins of the Necessary and Proper*

own enumerated ends, and for carrying out the powers of the other branches, Congress may use the necessary means. But how close must the specified ends be to the necessary means? After all, “necessary” has a wide semantic range, and if taken strictly it might authorize only The One Thing We Must Do Or The Sky Will Fall.¹⁹ But “necessary” is paired with a more lax word, “proper.”²⁰ If taken as a hendiadys, the phrase suggests that congressional action need not be “strictly necessary”; it must only be “properly necessary,” something like “appropriately necessary.” Thus the second term serves as a rule of construction against taking “necessary” in its strictest sense. As Chief Justice Marshall said in *McCulloch v. Maryland*, the word “proper” has the effect of “qualify[ing] that strict and rigorous meaning” that might otherwise be given to “necessary.”²¹

This reading of the phrase as a hendiadys suggests that there should not be sequenced inquiries into “necessary” and “proper.” There is one single inquiry into how close the connection is between the congressional action and the enumerated power it is intended to carry out. The Clause leaves vague what degree of connection is required. Yet this affirmation of incidental powers is precisely the sort of thing for which a determinate form of words will always be elusive. As a hendiadic phrase, “necessary and proper” does not eliminate that indeterminacy, but it gives it a smaller middling space. There is a rigorous word (“necessary”) and a warning against construing that word with too much rigor (“proper”). Moreover, “proper” reminds us that the incidental power Congress is exercising must belong to—one could say, it must be *proper to*—one of the enumerated powers.²²

The reading of “necessary and proper” offered here solves a textual puzzle.²³ And it is a better fit with the debates about the Clause at ratifi-

Clause (2010); John Harrison, Enumerated Federal Power and the Necessary and Proper Clause, 78 U. Chi. L. Rev. 1101 (2011) (reviewing Lawson et al.); John F. Manning, The Necessary and Proper Clause and Its Legal Antecedents, 92 B.U. L. Rev. 1349 (2012) (same). On the terminology of “incidental powers” and “means,” see *infra* note 325.

¹⁹ See Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank, in 19 The Papers of Thomas Jefferson, 24 January to 31 March 1791, at 275, 278 (Julian P. Boyd ed., & Ruth W. Lester assistant ed., 1974) (glossing “the *necessary* means” as “those means without which the grant of the power would be nugatory”).

²⁰ On “proper” as the more lax term, see *infra* notes 242–50 and accompanying text.

²¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418–19 (1819).

²² This sense of “proper” is not supported by *McCulloch*, but it is supported by Chief Justice Marshall’s essays defending *McCulloch*. See *infra* Section III.E.

²³ See *infra* text accompanying note 251.

cation and in the early republic. In those debates the canonical interpretations did not treat “necessary” and “proper” as separate requirements.²⁴ Moreover, three features of those debates are puzzling if the terms are read separately. First, it was repeatedly said that the Necessary and Proper Clause does nothing more than make explicit that Congress has incidental powers that were already an “unavoidable implication” of its enumerated powers.²⁵ Second, the early debates over the Clause were dominated, on both sides, by *reductio ad absurdum* arguments.²⁶ Third, Madison made an unusual claim: The Clause might be worded imperfectly but there was no better way to put it.²⁷ These are puzzles if the Clause divides crisply into two requirements. As this Article shows, however, none of these three features remains a puzzle if the Necessary and Proper Clause instead invoked a general principle of incidental powers, drawing a line for congressional action that is on the leeway side of a strict word.

There is of course more than one way to read “necessary and proper” and “cruel and unusual.” Each phrase could be read as two requirements.²⁸ Or each phrase could be read as a tautology.²⁹ Syntax does not answer these questions. There is no acid test for whether two terms sepa-

²⁴ These include The Federalist No. 33, at 203 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), No. 44, *supra* note 2, the opinions of Jefferson and Hamilton regarding the constitutionality of the First Bank of the United States, and the lengthy debate in the House of Representatives over the First Bank of the United States, especially the first speech by Madison. These sources, as well as the early interpretations that *did* read “necessary” and “proper” as separate requirements, are discussed below. See *infra* Section III.B.

²⁵ See *infra* notes 262–70 and accompanying text.

²⁶ See *infra* notes 273–77 and accompanying text.

²⁷ The Federalist No. 44, *supra* note 2; see also 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1232–1236, at 109–13 (Boston, Hillard, Gray & Co. 1833).

²⁸ On the Necessary and Proper Clause, see, for example, Lawson and Granger, *supra* note 6. On the Cruel and Unusual Punishments Clause, see, for example, Hershenov, *supra* note 13, and Ryan, *supra* note 13.

²⁹ This reading is easier for “necessary and proper.” See Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1728 n.20 (2002); see also H. Jefferson Powell, The Regrettable Clause: *United States v. Comstock* and the Powers of Congress, 48 San Diego L. Rev. 713, 724 n.42 (2011) (“It is very likely that Chief Justice Marshall viewed necessary and proper as a pleonasm with the second adjective proper importing no additional, legally significant, or justiciable meaning.” (emphasis omitted)). For discussion, see *infra* note 204. It has also been suggested that “cruel and unusual” could be a tautology. John D. Bessler, Cruel & Unusual: The American Death Penalty and the Founders’ Eighth Amendment 180–81 (2012). On the overlap between “cruel,” “cruel and unusual,” and “cruel or unusual,” see *infra* note 155.

rated by a conjunction actually work as one term or two.³⁰ It is ultimately a matter of which reading makes the most sense all things considered. And whatever reading of the text of these Clauses is adopted, there are other modalities of constitutional interpretation that lie beyond the scope of this Article.³¹

Nevertheless, these are persuasive readings. And if they are accepted, there will be implications. These readings close some avenues of interpretation and open up others; they strengthen the arguments in some judicial opinions and weaken the arguments in others. The central lesson could be summarized in the words of George Wright: “Because phrases involving hendiadys are not often understood as such, their meanings are jumbled, *reduced to a stricter logic than the verbal situation can justify*, or even entirely misread.”³² These Clauses have not been “entirely misread,” and the older interpretations are largely consistent with the readings here. In recent times, however, there has been a tendency for courts and commentators to read these Clauses dissectingly, to make every word stand alone instead of recognizing each phrase’s essential unity.³³ It is this unity, in its varied and elusive forms, that is emphasized by the figure of speech hendiadys.

Although this Article considers only these two Clauses of the Constitution, the analysis has implications for other paired terms in legal texts. Whenever there is a pair of terms separated by a conjunction, it can be read in various ways: as two requirements, as a tautology, or as a term of

³⁰ The Concise Oxford Dictionary of Literary Terms 97 (Chris Baldick ed., 1990) (“The status of this figure is often uncertain, since it usually cannot be established that the paired words actually express a single idea.”).

³¹ See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 3–92 (1982).

³² Wright, *supra* note 8, at 181 (emphasis added). This Article generally follows the convention of italicizing the phrase that is being read as a hendiadys without marking the alteration. That convention is found in Wright and in H. Poutsma, *Hendiadys in English. Together with Some Observations on the Construction of Certain Verbs*, 2 *Neophilologus* 202 (1917).

³³ For previous suggestions that “necessary and proper” could be read as a single unit of meaning, see Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. Pa. L. Rev. 1825, 1854 (2011); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 Ohio N.U. L. Rev. 773, 784 (2013). Hall almost anticipates the argument of this Article when he suggests that “necessary and proper” could be “a single construct,” with an analogy being the phrase “cruel and unusual.” Hall, *supra*, at 1854. Yet he makes the point only in passing and treats “proper” as a separate requirement that congressional action comport with “constitutional norms.” *Id.* at 1852–54. For previous suggestions that “cruel” and “unusual” fit together, see *infra* notes 127 and 146.

art (i.e., a term that has technical meaning known to specialists).³⁴ This Article demonstrates another possibility.

This Article also speaks to how interpreters should think about “text” when interpreting the Constitution. Some scholars would limit arguments from text to a fairly mechanical set of readings.³⁵ But the possibility of hendiadys is a reminder that there is more to reading a text than taking one word at a time. Hendiadys also illustrates the limits of the bare text. Whether “necessary and proper” and “cruel and unusual” should be understood as instances of hendiadys cannot be determined from the text of the Constitution alone. One must read the text in its setting in life, in its historical context. This point provides support for, among other arguments, Dean William Treanor’s critique of those who would read the text of the Constitution apart from the disputes and decisions surrounding its ratification.³⁶ There is a point of difference, however. Where Treanor criticizes “close reading,” this Article suggests that the problem with the existing “close readings” of these Clauses is that they have not been close enough.

This Article proceeds as follows. Part I explains the figure of speech hendiadys. Part II reads “cruel and unusual” as a hendiadys that refers to innovation in cruelty. Part III reads “necessary and proper” as a hendiadys that affirms that Congress has incidental powers to carry into execution the other powers granted by the U.S. Constitution. “Necessary” means the connection between the enumerated end and the incidental power must be close, while “proper” reaffirms that connection and clarifies that “necessary” is not to be taken in its strictest sense.

³⁴ These options shade into one another and can overlap. For example, a phrase may be a term of art known to specialists, yet what the specialists know might simply be *that* the phrase is read as two independent requirements, as two synonyms, or as a hendiadys. On another possibility, a disjunctive reading, see *infra* note 203.

³⁵ One example is the reading of “Congress” in the First Amendment at issue in Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 *Stan. L. Rev.* 1209, 1252–55 (2010); and Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *Duke L.J.* 1213, 1243–47 (2015).

³⁶ See William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning and the Case of Amar’s Bill of Rights*, 106 *Mich. L. Rev.* 487 (2007).

I. HOW HENDIADYS WORKS

Hendiadys is a figure of speech in which two terms, separated by a conjunction, are melded together to form a single complex expression. The word *hendiadys* is a Latin word formed from three Greek words (ἐν δὶὰ δύοϊν) meaning “one by means of two.” The “two” in the hendiadys may be nouns, adjectives, or verbs. The “one” is the new meaning or meanings that emerge from the two. In a hendiadys, “a single conceptual idea is realized by two distinct constituents.”³⁷ Or, as one scholar put it, “hendiadys might be thought of as the building of a hybrid representation developed from two distinct concepts, which produces a wider array of implicatures than can be recovered from each of the two original parts.”³⁸

Yet it is important to qualify the definition used here. Because hendiadys is only a slice of the phenomenon of coordinate construction, any definition exaggerates the difference between what falls just inside and just outside the definitional lines.³⁹ As defined here, hendiadys is relatively broad. Narrower definitions are restricted to nouns, or to instances in which one term is subordinate to the other.⁴⁰ Those limitations are hard to justify, however, and *hendiadys* is commonly used by linguists and literary scholars in this broader sense.⁴¹

³⁷ Paul Hopper, *Hendiadys and Auxiliation in English*, in *Complex Sentences in Grammar and Discourse: Essays in Honor of Sandra A. Thompson* 145, 146 (Joan Bybee & Michael Noonan eds., 2002).

³⁸ Nigel Fabb, *Is Literary Language a Development of Ordinary Language?*, 120 *Lingua* 1219, 1229 (2010).

³⁹ Cf. Sandra Mollin, *The (Ir)reversibility of English Binomials: Corpus, Constraints, Developments* 9–10 (2014) (noting that the choice of definition for *hendiadys* determines how much it overlaps with another category).

⁴⁰ E.g., Fowler’s *Dictionary of Modern English Usage*, at ix (Jeremy Butterfield ed., 4th ed. 2015) [hereinafter *Fowler’s Dictionary*]. On the variety of definitions for hendiadys in biblical Hebrew, see Rosmari Lillas-Schuil, *A Survey of Syntagms in the Hebrew Bible Classified as Hendiadys*, in *Current Issues in the Analysis of Semitic Grammar and Lexicon II: Oslo-Göteborg Cooperation 4th–5th November 2005*, at 79, 81–84 (Lutz Edzard & Jan Retsö eds., 2006).

⁴¹ E.g., Edward Hirsch, *A Poet’s Glossary* 278–79 (2014); Frank Kermode, *Shakespeare’s Language* 100–01 (2000); Fabb, *supra* note 38, at 1229; Wright, *supra* note 8. The restrictions in the definition here are not pointless. The reference to a conjunction helps the reader grasp the concept, with no loss of scope. (Some languages, such as Akkadian and Latin, do use asyndetic hendiadic constructions, but English does not.) The limitation to two terms is traditional and economical for this Article. There is another figure of speech called

Many instances of this figure of speech can be found in ancient texts, especially in Akkadian,⁴² Hebrew,⁴³ Greek,⁴⁴ and Latin.⁴⁵ The standard example is from Virgil's *Georgics*: "we drink from *cups and gold*," meaning "golden cups."⁴⁶ In German, hendiadys was employed to good effect by Johann Gottfried von Herder.⁴⁷ And scholars have identified this figure of speech in many other languages, including Rotinese, a language predominantly spoken on the Indonesian island of Roti.⁴⁸

hendiadris, and yes, it means what you think it means. See Hirsch, *supra*, at 279; Lillas-Schuil, *supra* note 40, at 98.

⁴² John Huehnergard, *A Grammar of Akkadian* 125–26 (3d ed. 2011). On hendiadys in Assyrian (which developed from Akkadian), see W. F. Albright, Notes on Assyrian Lexicography and Etymology, 16 *Revue D'Assyriologie et D'Archéologie Orientale* 173, 178 (1919).

⁴³ See, e.g., Bill T. Arnold & John H. Choi, *A Guide to Biblical Hebrew Syntax*, 148–49 (2003); Herbert Chanan Brichto, *Toward a Grammar of Biblical Poetics: Tales of the Prophets* 40–42 (1992); Lillas-Schuil, *supra* note 40; see also E. A. Speiser, Introduction to Genesis, at lxx-lxxi (1964) (noting occurrences of hendiadys in Genesis); Jacob Bazak, The Meaning of the Term "Justice and Righteousness" (טַפְשָׁם הַקְדָּצוֹ) in the Bible, 8 *Jewish L. Ann.* 5 (1989) (analyzing the common biblical phrase "justice and righteousness" as a hendiadys that "refers to a system of law free from the usual defects . . . [of] legal systems"); J. Kenneth Kuntz, *Hendiadys as an Agent of Rhetorical Enrichment in Biblical Poetry, With Special Reference to Prophetic Discourse*, in 1 *God's Word for Our World* 114, 123–133 (J. Harold Ellens et. al. eds., 2004) (giving examples of hendiadys in the Prophets). One of the more familiar examples from the Hebrew Bible is Genesis 1:2, where the earth is described as "*waste and void*" (English Revised Version). Some translations eliminate the hendiadys: e.g., "a vast waste" (Revised English Bible).

⁴⁴ Sansone, *supra* note 8, at 17. For expressions from Plato that are close to, if not quite, hendiadys, see J. G. Warry, 21 *Greek Aesthetic Theory: A Study of Callistic and Aesthetic Concepts in the Works of Plato and Aristotle* 40–41 (2013). There appears to be at least one example in Middle Hittite, another Indo-European language. See Terumasa Oshiro, *Hendiadys in Hittite*, in *Indogermanische Forschungen: Zeitschrift Für Indogermanistik und Allgemeine Sprachwissenschaft* 98 (1993).

⁴⁵ E.g., Cicero, *Catilinarians* 276 (Andrew R. Dyck ed., 2008) (listing text and commentary citations for eleven instances of the figure). On precursors to the more developed hendiadys in Virgil, see Walter Stockert, Wood and Wax: "Hendiadys" in Plautus, in 6 *Papers of the Leeds International Latin Seminar* 1 (Francis Cairns & Malcolm Heath eds., 1990).

⁴⁶ This line from Virgil is "often taken as the definitive example of hendiadys." Sansone, *supra* note 8, at 19 & n.10. Other examples from Virgil include "by *force and arms*" (i.e., "by force of arms") and "I fear *the Greeks and bearing gifts*" (i.e., "I fear the gift-bearing Greeks"). Hopper, *supra* note 37, at 146.

⁴⁷ Johann Gottfried von Herder, *How Philosophy Can Become More Universal and Useful for the Benefit of the People*, in *Philosophical Writings* 3, 28 & n.62 (Michael N. Forster ed. & trans., 2002); see also Michael N. Forster, Introduction to *Philosophical Writings*, *supra*, at ix (hinting that Herder's use of hendiadys was conscious).

⁴⁸ See Fabb, *supra* note 38, at 1229. Fabb includes as instances of hendiadys terms that are not adjacent. Some writers on hendiadys in English do the same. See Poutsma, *supra* note 32, at 215 ("*Conjures* the wandering stars, *and makes* them stand" from Macbeth).

Among English writers, hendiadys is most associated with William Shakespeare. By the count of one scholar, there are sixty-six instances in *Hamlet* alone.⁴⁹ Some have the same straightforward quality that the Virgilian example does: “*law and heraldry*” refers to heraldic law.⁵⁰ But for other examples in *Hamlet* the meaning of the hendiadic phrase is more complex. When Hamlet speaks of “*sense and secrecy*,” he means not a secret sense but “good sense, which calls for secrecy.”⁵¹ And when Hamlet refers to the streets that “lend a *tyrannous and damned* light” to a murder, he might mean a light that is “damnably pitiless, or the kind of pitiless light that shines on the damned.”⁵² Other examples could be given, including ones from Old and Middle English,⁵³ and in Modern English from Thomas Cranmer,⁵⁴ Christopher Marlowe,⁵⁵ the translators of the King James Version of the Bible,⁵⁶ John Milton,⁵⁷ John Locke,⁵⁸

⁴⁹ Wright, *supra* note 8, at 176.

⁵⁰ John Upton, *Critical Observations on Shakespeare* 336 (London, G. Hawkins 1748).

⁵¹ Wright, *supra* note 8, at 187.

⁵² *Id.* at 186.

⁵³ Hopper, *supra* note 37, at 147, 151, 152.

⁵⁴ Daniel Swift, *The Book of Common Prayer*, in *The Oxford Handbook of English Prose 1500–1640*, at 576, 584 (Andrew Hadfield ed., 2013) (giving two examples from the General Confession that begins Morning Prayer and Evening Prayer in the Book of Common Prayer: “*Almighty and most merciful Father, we have erred and strayed from thy ways, like lost sheep*.”); cf. Kermode, *supra* note 41, at 101 (noting the “doubles, antitheses, and repetitions” in *Hamlet*, and suggesting that “[t]his way of writing was, in its essence, familiar from the English liturgy, and its remote origin is probably in the parallelisms found in the Psalms”).

⁵⁵ Christopher Marlowe, *Doctor Faustus: A 1604-Version Edition*, at 78 (Michael Keefer ed., 2d ed. 2007) (“*the Institute / And universal body of the law*”).

⁵⁶ Examples from the earliest chapters of Genesis in the King James Version include “*without forme, and voyd*” (1:2), “[*b*]e fruitfull, and multiply” (1:22, 28), “*created and made*” (2:3), “*thy sorowe and thy conception*” (3:16), “[*a*] fugitiue and a vagabond” (4:12), and “*a fugitiue, and a vagabond*” (4:14). With the exception of Genesis 2:3, each of these phrases is also a hendiadys in the Hebrew original.

⁵⁷ Wright, *supra* note 8, at 172, 184 n.14. *Paradise Lost* has, among others, bees “on thir *mirth and dance*, / Intent” (i.e., mirthful dance), “*ancient and prophetic fame*” (i.e., anciently prophesied fame), and “*joy and tidings*” (i.e., joyful tidings). John Milton, *Paradise Lost*, bk. I, ll. 786–87 (Barbara K. Lewalski ed., 2007) (1674); *id.* at bk. II, l. 346; *id.* at bk. X, ll. 345–46.

⁵⁸ Govert den Hartogh, *Made by Contrivance and the Consent of Men: Abstract Principle and Historical Fact in Locke’s Political Philosophy*, reprinted in *Locke’s Moral, Political and Legal Philosophy* 337, 355–57 (J.R. Milton ed., 1999) (positing that “Locke is rather fond of the figure of hendiadys,” and proceeding to analyze “consent” in terms of the words with which Locke pairs it, as in “*Agreement and consent of Men*” and “*contrivance, and the Consent of Men*”).

George Berkeley,⁵⁹ William Blackstone,⁶⁰ Edward Gibbon,⁶¹ William Hazlitt,⁶² Charles Dickens,⁶³ Elizabeth Gaskell,⁶⁴ William Makepeace Thackeray,⁶⁵ E.M. Forster,⁶⁶ Dylan Thomas,⁶⁷ and many others.⁶⁸ Although this figure of speech was not included in the editions of Dr. Johnson's *Dictionary* published in his lifetime, it can be found in the 1827 edition of the *Dictionary* augmented by another hand,⁶⁹ and it was in-

⁵⁹ A.A. Luce, *Berkeley and Malebranche: A Study in the Origins of Berkeley's Thought* 156 (2d prtg. 2002) (suggesting that Berkeley's "all *knowledge and demonstration*" is probably "a hendiadys, whose real import is 'all demonstrative knowledge'").

⁶⁰ For example, Blackstone says foreign laws that have "been *introduced and allowed* by our laws, so far they oblige, and no farther; their authority being wholly founded upon that *permission and adoption*." 1 William Blackstone, *Commentaries* *14. Here there are two instances of hendiadys, chiastically arranged, referring to a treatment of foreign laws that falls somewhere between full reception (i.e., introduction and adoption) and mere tolerance (i.e., allowance and permission). A less intricate example can be found on the next page of the *Commentaries*, where Blackstone says that a civilian or canonist needs to know "how far the English laws have given sanction to the Roman" in order to act "with *prudence and reputation* as an advocate," i.e., in order to act with the prudence that redounds to one's reputation. *Id.* at *15.

⁶¹ Paul Cartledge, *Vindicating Gibbon's Good Faith*, 158 *Hermathena* 133, 141 (1995) (understanding Gibbon's "an *historian and philosopher*" as a hendiadys meaning "a philosophical historian").

⁶² William K. Wimsatt, Jr., *Parallelism, in Perspectives on Style* 127, 151–52 (Frederick Candelaria ed., 1968) (suggesting three instances of hendiadys in Hazlitt's lecture *On Dryden and Pope*: "'Brilliance and effect' might be 'brilliant effect'; 'smooth and polished verse' might be 'smoothly polished verse'; 'tug and war' suggests 'tug of war.'").

⁶³ Poutsma, *supra* note 32, at 290 (taking "I felt it was time for *conversation and confidence*" from *David Copperfield* as meaning "confidential conversation"); Garrett Stewart, "Written in the Painting": Word Pictures from Italy in *Imagining Italy: Victorian Writers and Travellers* 216, 233 (Catherine Waters, Michael Hollington & John Jordan eds., 2010) (taking Dickens's "*grace and youth*" to be a hendiadys meaning either "graceful youth" or "youthful grace"); *id.* at 232 (finding a hendiadys in Dickens's assertion that for the traveler Roman ruins could "*people and restore*" the past).

⁶⁴ Poutsma, *supra* note 32, at 290 (glossing Gaskell's "*a sin and a shame*" as "shameful sin").

⁶⁵ *Id.* (taking Thackeray's "*verses and nonsense*" to mean "nonsensical verses").

⁶⁶ See E.M. Forster, *Howards End* 27–28 (Everyman's Library ed., 1992) ("To think that because you and a young man meet for a moment, there must be all these *telegrams and anger*"); Philip R. Berk, Canto VII: The Weal of Fortune, in *Lectura Dantis: Inferno, a Canto-by-Canto Commentary* 101, 107 (Allen Mandelbaum, Anthony Oldcorn, & Charles Ross eds., 1998) (understanding "all these *telegrams and anger*" as a hendiadys).

⁶⁷ Wright, *supra* note 8, at 171–72 (finding several examples in Dylan Thomas, including "*strut and trade*," which "surely means something like 'parading for money'").

⁶⁸ Numerous examples are collected in Poutsma, *supra* note 32.

⁶⁹ Compare Samuel Johnson, *A Dictionary of the English Language* (6th ed. London, William Pickering 1785) (no entry for "Hendiadys" or "Hendiadis"), with Samuel Johnson & John Walker, *A Dictionary of the English Language* 342 (R.S. Jameson ed., London, Wil-

cluded in some older English-Latin dictionaries.⁷⁰ In the late eighteenth and early nineteenth centuries, hendiadys was noted in other English dictionaries,⁷¹ in commentaries on Shakespeare, in commentaries on the Bible,⁷² and in Latin grammars.⁷³

In more recent English usage, hendiadys tends to be colloquial. When Julia Child makes Boeuf Bourguignon in an episode of *The French Chef*, she says that to brown the beef it needs to be “good and dry.”⁷⁴ We know by instinct that she used those two words to mean one thing: it needs to be really dry. If I say “I will try and do better,” I mean one thing, not two. But neither the trying nor the doing better is redundant. I want to do better but I need to try. Other familiar examples include “cakes and ale” and “law and order”⁷⁵ (both instances of nominal hendiadys); “hot and bothered,” “high and mighty,” and “tried and true”⁷⁶

liam Pickering 1827) (defining “Hendiadis” as “[a] rhetorical figure, when two noun substantives are used instead of a substantive and adjective”).

⁷⁰ E.g., Elisha Coles, *A Dictionary, English-Latin, and Latin-English* (London, John Richardson, 2d ed. enlarged 1679) (defining “Hendiadis” as “one thing expressed by two terms”).

⁷¹ E.g., George William Lemon, *English Etymology; or, a Derivative Dictionary of the English Language: In Two Alphabets* (London, G. Robinson 1783) (“*hendiadis; a rhetorical figure; when one thing is split into two*”). Webster included it, but defined it more narrowly: “A figure, when two nouns are used instead of a noun and an adjective.” 1 Noah Webster, *An American Dictionary of the English Language* (Mario Pei ed., Johnson Reprint Corporation 1970) (1828). On the scope of hendiadys, see *supra* notes 40–41 and accompanying text.

⁷² E.g., H. Dimock, *Notes Critical and Explanatory on the Books of Psalms and Proverbs* 57 (Gloucester, R. Raikes 1791) (“*vanity and riches*,” in Psalm 39:7, “by an Hendiadis, signif[ies] *vain riches*”); Thomas Wintle, Daniel, an Improved Version Attempted; with a Preliminary Dissertation, and Notes Critical, Historical, and Explanatory 84 (London, Thomas Tegg & Son 1792) (“*light and understanding*” in Daniel 5:11 is “Hendiadys” for “an enlightened understanding”). Dimock notes the possibility of the figure in a number of other passages. Dimock, *supra*, at 65, 255, 379, 391, 417–18, 469, 471.

⁷³ E.g., Alexander Adam, *The Principles of Latin and English Grammar* 182 (Edinburgh, A. Kincaid and W. Creech 1772) (“When that, which is in reality one, is so expressed, as if there were two, it is called *Hendiadys*; as, *Pateris libamus et auro*, for *aureis pateris*. Virg.”); Farther English Examples, or, Book of Cautions for Children, In Rendering English into Latin; with the Signification, and Use of Certain English Particles 102 (Eton, J. Pote, new ed. 1782) (“HENDYADIS is when one Thing is expressed as if it were two.”); George B. Gardiner & Andrew Gardiner, *A Latin Anthology for Beginners with Notes and Vocabulary* 96, 105, 114, 124 (London, Edward Arnold 1804) (noting the figure four times).

⁷⁴ *The French Chef* (WGBH television broadcast Feb. 11, 1963). Another example comes from H.L. Mencken, *A Little Book in C Major* 19 (1916): “Democracy is the theory that the common people know what they want, and deserve to get it *good and hard*.”

⁷⁵ *The Concise Oxford Dictionary of Literary Terms*, *supra* note 30, at 97.

⁷⁶ Brichto glosses “tried and true” as “proved true by trial.” Brichto, *supra* note 43, at 40.

(adjectival hendiadys); and “*rise and shine*” (verbal hendiadys).⁷⁷ Sometimes, but more rarely, a hendiadys in English combines two different parts of speech: “the *rough and tumble* of politics.”⁷⁸

Little attention has been paid to hendiadys in legal texts.⁷⁹ But that is not to say it does not exist. This figure of speech has been identified, for example, in ancient Greek and Roman law,⁸⁰ and in contemporary Italian legal texts.⁸¹ There are phrases in the Internal Revenue Code of the United States that are good candidates for being read as a hendiadys, including “*ordinary and necessary* expenses.”⁸² Another likely hendiadys is the “*open and notorious*” requirement for adverse possession.⁸³ “*Arbitrary and capricious*” may be one.⁸⁴ And a commentator has noted that New Jersey and Ohio courts have read the requirement that the state fund a “*thorough and efficient*” school system as if it were a hendiadys.⁸⁵ Hendiadys is used in other official documents. For example, on the first page of British passports it is said that the Queen “*requests and*

⁷⁷ James M. Rose, *The Law and the Hendiadys*, 23 *Westchester B.J.* 207, 208 (1996). On verbal hendiadys in English, see Hopper, *supra* note 37.

⁷⁸ See Gareth B. Matthews, *On Not Being Said to Do Two Things*, 31 *Analysis* 204, 207 (1971) (glossing that phrase as “the rough tumble of politics”); Poutsma, *supra* note 32, at 289 (glossing the phrase as “rough tumbling” (emphasis omitted)).

⁷⁹ For example, Peter Tiersma discusses various conjoined phrases, but he emphasizes their redundancy and never considers the possibility of hendiadys. Peter M. Tiersma, *Legal Language* 15, 61–65 (1999).

⁸⁰ E.g., Michael Gagarin, *The Thesmothetai and the Earliest Athenian Tyranny Law*, 111 *Transactions Am. Philological Ass’n* 71, 72 n.6 (1981); see Stockert, *supra* note 45, at 6 (suggesting that in Latin the origin of using pairs of near synonyms was in “Roman religious and legal language”).

⁸¹ See Giuseppe Franco Ferrari, *Fundamental Rights and Freedoms*, in *Introduction to Italian Public Law* 255, 276 (Giuseppe Franco Ferrari ed., 2008); Antonello Tarzia, *Public Administration*, in *Introduction to Italian Public Law*, *supra*, at 97, 112–13.

⁸² 26 U.S.C. § 162(a) (2012). I am grateful to Eric Zolt for this suggestion.

⁸³ These are not separate requirements, for “open and notorious” is *one* of the requirements for adverse possession. Nor do these appear to be synonyms, for adverse possession can be hidden from sight but known to all. Rather, each term contributes something to the whole, either visibility or salience. I am grateful to Stuart Banner for this suggestion and to Thomas Merrill for comments.

⁸⁴ Perhaps “capricious” indicates the kind of arbitrariness that is illegal, or perhaps each term contributes a distinct notion, as with “open and notorious.” On the possibility of a hendiadys turning into a term of art, see *infra* note 94 and accompanying text.

⁸⁵ Jeffrey J. Grieve, Note, *When Words Fail: How Idaho’s Constitution Stymies Education Spending and What Can Be Done About It*, 50 *Idaho L. Rev.* 99, 129–31 (2014). Grieve uses the term *hendiadys*.

requires” that the bearer be permitted to move freely.⁸⁶ (In addition, there are linguistic phenomena in legal texts that are not technically examples of hendiadys but which are similar, such as a statutory list of conjoined terms that is not reducible to its component parts.⁸⁷)

Hendiadys is thus a figure of speech that can be found in many languages, eras, and registers of speech.⁸⁸ In all these diverse contexts, a pair of words separated by a conjunction can be a single unit of meaning. There is no reason to think it would be impossible for this figure to appear in the Constitution. Before considering that question, however, three more introductory points need to be made.

First, hendiadys is distinct from other semantic relationships, such as a term of art or a mere doubling, but the line between these various relationships is not always sharp, and it can change over time.⁸⁹ For example, often two words are paired but their meanings are synonymous. “Cease and desist” is a lawyerly duplication, at least at present, and it means no more than either “cease” or “desist” alone would mean.⁹⁰ Such a pairing of synonymous words is a tautology, not a hendiadys.⁹¹ Or consider a term of art, which has an accepted, technical meaning, often

⁸⁶ For discussion of how this phrase can be translated into other languages, including the suggestion that the translator use an adverb or preposition instead of reproducing the structure of the English phrase, see Enrique Alcaraz & Brian Hughes, *Legal Translation Explained* 39 (2002).

⁸⁷ See, e.g., *Moskal v. United States*, 498 U.S. 103, 120–21 (1990) (Scalia, J., dissenting) (“The entire phrase ‘falsely made, forged, altered, or counterfeited’ is self-evidently not a listing of differing and precisely calibrated terms, but a collection of near synonyms which describes the product of the general crime of forgery.”).

⁸⁸ See Fabb, *supra* note 38; Poutsma, *supra* note 32, at 203.

⁸⁹ See, e.g., Stockert, *supra* note 45, at 1–2. In the same work in which Wright counts sixty-six instances of hendiadys in *Hamlet*, he gives another twenty-three doublings that are “not convincing examples” of hendiadys, yet are “close.” Wright, *supra* note 8, at 189–90.

⁹⁰ See David Mellinkoff, *Mellinkoff’s Dictionary of American Legal Usage* 68 (1992) (“two French-based English words joined in saying *stop, stop*”). Mellinkoff says “cease and desist” has “been so welded by usage as to have the effect, in proper context, of a single word.” *Id.* at 129. As Justice Scalia said, “Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void).” *King v. Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting).

⁹¹ Bazak, *supra* note 43, at 6 (distinguishing hendiadys from tautology, because “in a tautology the second word is synonymous with the first and is added only for the sake of emphasis”); Stockert, *supra* note 45, at 1–2, 4–5 (noting that hendiadys requires a “semantic gap,” some “semantic discontinuity” between the two terms).

one that has been worn smooth by use.⁹² For example, in ordinary usage “equity” often means justice, but in legal usage it has a technical meaning, referring to the set of doctrines and remedies developed by the English Court of Chancery.⁹³ For hendiadys no such established, specialized meaning is required. Yet these concepts cannot always be crisply distinguished, and a hendiadys in a legal text can become a tautology or a term of art. Thus over time a phrase can be protean, shifting shapes, and sometimes—for a while or for good—it can be wrestled to the ground and captured in one form.⁹⁴

Second, although hendiadys is not a particularly common figure of speech, it has long been the case that it is more commonly *used* than it is recognized and commented on. Although the phenomenon can be found in a number of classical texts, the first clear attestation of a name for it does not come until the early third century AD.⁹⁵ Although Shakespeare’s use of this figure was perceived at least as early as the eighteenth century,⁹⁶ its pervasiveness in the plays seems not to have been

⁹² Term of Art, Black’s Law Dictionary (10th ed. 2014) (defining *term of art* as “[a] word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts”).

⁹³ Harrison, *supra* note 18, at 1116; see also Samuel L. Bray, The Supreme Court and the New Equity, 68 Vand. L. Rev. 997, 1012–14 (2015) (noting the use of “equitable” as a term of art in federal statutes). Similarly, Chief Justice Ellsworth was treating “Appeal” and “Writ of Error” as terms of art when he said they have a “fixed and technical sense.” *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796).

⁹⁴ One instance of such a process—two terms being used as a hendiadys that becomes a legal term of art—is over three thousand years old. According to Moshe Weinfeld, the Akkadian phrase “bond and oath” (*riksu u māmītu*) was used to refer to a treaty: “*riksu* originally expresse[d] the demands presented by the overlord or ally while *māmītu* reflect[ed] the acceptance of the demands by the other party,” but “the original meaning of these terms fell into oblivion after they were combined into a hendiadys and turned into a technical term for ‘treaty.’” M. Weinfeld, *Covenant Terminology in the Ancient Near East and Its Influence on the West*, 93 J. Am. Oriental Soc’y 190, 190–91 & n.3 (1973).

⁹⁵ The first attested naming of this figure of speech appears in Pomponius Porphyrio (early third century AD). The term also appears in the *Homeric Dictionary* of Appollonius the Sophist (first century AD), though it is possible the term was added by a later hand. For the information in this note I am grateful to Albertus Horsting. E-mail from Albertus Horsting, to author (May 8, 2015, 12:49 PDT) (on file with author).

⁹⁶ For example, see 18 The Dramatick Writings of Will. Shakespeare, With the Notes of All the Various Commentators; Printed Complete from the Best Editions of Sam. Johnson and Geo. Steevens 7 (London, John Bell 1788) (noting that Shakespeare “sometimes expresses one thing by two substantives,” such as “*law and heraldry*,” i.e., “herald law,” and “*death and honour*, i.e. honourable death”).

recognized until the 1980s.⁹⁷ And when this figure of speech is identified, there are sometimes skeptics.⁹⁸ (With good reason, too, because those who know the figure can be enthusiastic and exaggerated, finding it everywhere.⁹⁹) But a writer does not need to know this figure of speech in order to use it. Hendiadys is one of the “mechanisms of language that we use without thinking and without naming.”¹⁰⁰

Third, there is no one thing that hendiadys “means.” To recognize that a pair of words with a conjunction is a single complex expression does not establish how the components interact. The uses and possible meanings of hendiadys are multiple, overlapping, and not sharply defined.¹⁰¹ Context is crucial. Still, something can be said about the figure’s use.

The most common and straightforward use of hendiadys is for one term to modify another. In Greek and Latin, the second term usually modifies the first (e.g., “*cups and gold*”), but that pattern does not hold

⁹⁷ See Wright, *supra* note 8; Frank Kermode, Cornelius and Voltemand: Doubles in *Hamlet*, in *Forms of Attention* 33 (1985).

⁹⁸ See E. Adelaide Hahn, *Hendiadys: Is There Such a Thing?* (Based on a Study of Vergil), 25 *Classical Wkly.* 193 (1922). Brichto calls hendiadys “rather rare in English.” Brichto, *supra* note 43, at 40; see also Matthews, *supra* note 78, at 207 (“Hendiadys is an ancient trope recognized to be common in Biblical Hebrew and in classical Greek and Latin but thought to be rare in English.”). This perception may be incorrect, however. The English examples given above, see *supra* notes 53–67, have not been previously collected, and there are doubtless many more.

⁹⁹ Cf. Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in *Textual Dynamics of the Professions: Historical and Contemporary Studies of Writing in Professional Communities* 76, 87 (Charles Bazerman & James Paradis eds., 1991) (maintaining that “one of the most persuasive endeavors that a literary scholar can engage in is to find something (a device, an image, a linguistic feature, a pattern) that no one else has seen—and to find it everywhere,” and giving as an example George Wright’s analysis of hendiadys in *Hamlet*). For example, one scholar has persuasively argued that “true and fair” is a hendiadys in accounting standards, but when she identifies the same phrase as a hendiadys in Shakespeare and Donne the conclusion is much less convincing, because the context of the quotations suggests that each term should be read separately. See A. Zanola, *The ‘True and Fair’ Legal Formula: Hendiadys or Tautology?*, 1 *New Ground Res. J. Leg. Stud. Res. & Essays* 1 (2013).

¹⁰⁰ Fowler’s *Dictionary*, *supra* note 40, at ix.

¹⁰¹ See Kuntz, *supra* note 43, at 134; cf. Jacques Derrida, *Et Cetera . . .* (and so on, und so weiter, and so forth, et ainsi de suite, und so überall, etc.) (Geoffrey Bennington trans.), *reprinted in Deconstruction: A User’s Guide* 282, 283 (Nicholas Royle ed., 2000) (listing a series of phrases of the form “deconstruction *and* x,” and then saying that “in each of these great sets, the conjunction ‘and’ is resistant not only to association but also to serialization, and it protests against a reduction which is at bottom absurd and even ridiculous”).

in English.¹⁰² When a hendiadys is used this way, compared to the more common alternative—having one word modify the other explicitly (e.g., “golden cups”)—the figure has a tendency away from subordination. Hendiadys can let each word have its due, instead of letting one serve the other syntactically, even though one word does serve the other semantically.¹⁰³ Sometimes either term in the hendiadys could modify the other, and it is unclear in which direction the modification runs, or even whether the ambiguity is intended.¹⁰⁴

Sometimes the terms in the hendiadys will remain distinct, but their relationship will be more dynamic than simply B-modifies-A.¹⁰⁵ The identity of the terms may be dissolved and replaced by something new, with each term contributing something to the meaning of the whole.¹⁰⁶ When Polonius, a hendiadys heavy hitter if there ever was one, speaks of “[t]he *flash and outbreak* of a fiery mind,” we cannot pry apart the flash and the outbreak.¹⁰⁷ When he refers to “this *encompassment and drift* of question,” it is what Frank Kermode calls “a doublet of which the parts

¹⁰² English usage is varied, but in the colloquial examples the first term tends to be more general; it modifies or intensifies the second (“good and warm,” “hot and bothered,” “nice and fat”). See Hopper, *supra* note 37, at 148.

¹⁰³ Other implications of this straightforward use of hendiadys are seemingly less relevant for legal texts, including the rhetorical value of repetition, see Kuntz, *supra* note 43, at 134; the indication of verbal aspect in a narrative, see Hopper, *supra* note 37, at 147–48; and the metrical possibilities created by having another way of putting the point. This last implication may explain the seeming predominance of hendiadys in English poetry, at least before the *vers libre* revolution. When meter matters, hendiadys is valuable.

¹⁰⁴ An example from *Hamlet*:

When Horatio says he would not believe in the Ghost “Without the *sensible and true* avouch / Of mine own eyes” (1.i.57–58), he must mean “the sensorily accurate testimony” of his eyes—that is, the first adjective must modify the second—or, if one prefers, “the accurate sensory testimony,” with “sensory testimony” taken as a compound unit modified by “accurate.” Either way the two elements of the hendiadys, though grammatically parallel, are not semantically parallel, and the most likely paraphrases would change the coordinate structure and make one of the two elements subordinate to the other or to a unit that includes the other.

Wright, *supra* note 8, at 174.

¹⁰⁵ Some authorities restrict the term to instances where one part is “subordinate in sense to the other.” Fowler’s Dictionary, *supra* note 40, at 372. On the scope of hendiadys, see *supra* notes 40–41 and accompanying text.

¹⁰⁶ Fabb, *supra* note 38, at 1229; R.W.L. Moberly, *Whose Justice? Which Righteousness? The Interpretation of Isaiah V 16, 51 Vetus Testamentum* 55, 60 (2001) (“[T]he combination [of *šēdaqā*] with *mišpat* generally creates what is in effect a hendiadys with a differing semantic range from that of *šēdaqā* on its own.”).

¹⁰⁷ Kermode, *supra* note 41, at 109 (“[T]he flash cannot be distinct from the outbreak, and both depend on the fire in ‘fiery.’”).

cannot be made distinct, to be glossed clumsily as meaning by casual, indirect enquiry or something of the sort.”¹⁰⁸ Yet another example of a complex hendiadys can be found in Laertes’s dialogue with Ophelia. Laertes refers to the “*perfume and suppliance* of a minute,” which, Kermode says, “means something like ‘a pleasant, transitory amusement,’ but the two nouns are interlocked; one can’t remove either of them without destroying the sense.”¹⁰⁹

In some of these instances there is an intensification of the two terms by their being conjoined.¹¹⁰ In other instances the new unitary meaning is not more intense than the sum of its parts.¹¹¹ Sometimes the new meaning even seems to lie intermediate to the two terms.¹¹² When Polonius speaks of his “*lecture and advice*,” we cannot tell where the lecture ends and the advice begins; perhaps he is saying that his words fell somewhere between a formal lecture and a friendly chat.¹¹³ Similarly,

¹⁰⁸ Id.

¹⁰⁹ Id. at 106. Numerous other instances could be given where a hendiadys is more complex than one term modifying another. For example, in *Hamlet*, “*will and matter*” can be understood as “a complicated hendiadys” that means something like “‘purposed business.’” Id. at 113. In *Measure for Measure*, there is “a *Hamlet*-like hendiadys: ‘*the fault and glimpse of newness*,’ which a reader or spectator must expand into something like ‘a display of new authority that may be seen as a fault.’” Id. at 150. And in the book of Isaiah, the Lord says: “I cannot endure *iniquity and assembly*.” Isaiah 1:13b (author’s translation). This is not an accumulation of two separate facts: the people are guilty of moral failure (“iniquity”), and the people engage in religious devotion (“assembly”). Rather it is the conjunction of the two that brings this assertion of divine displeasure. The moral failure of the worshippers makes their worship a moral failure.

¹¹⁰ Kermode, *supra* note 41, at 102 (describing hendiadys as a figure by which “the meaning of the whole depends upon a kind of unnaturalness in the doubling, a sort of pathological intensification,” one that “can introduce unease and mystery into an expression”); Wright, *supra* note 8, at 169. Intensification is common for English hendiadys in the pattern of “good and x,” as well as for hendiadys in biblical Hebrew, see *supra* note 56 (listing examples of hendiadys in Genesis 1–4).

¹¹¹ See, e.g., *supra* note 75 and accompanying text (“cakes and ale”); *supra* note 50 and accompanying text and note 96 (“law and heraldry” and “death and honour”); *supra* note 8 and accompanying text (“cups and gold”); *supra* note 108 and accompanying text (“encompassment and drift”); *supra* note 109 (“will and matter” and “the fault and glimpse of newness”); cf. Harley Granville-Barker, 1 Prefaces to Shakespeare 169 (1952) (suggesting that where “repetition by complement,” i.e., hendiadys, appears in *Hamlet*, the meaning of the constituents of the phrase is sometimes “amplified or intensified,” sometimes “enlarged,” and sometimes “modified”).

¹¹² In addition to the examples given in the text, see *supra* note 60.

¹¹³ Admittedly this phrase could be taken in other ways: as both rather than each one singly (a “lecture” and “advice”) or as both reciprocally (an “advising lecture” and “lecturing advice”). Cf. Kermode, *supra* note 41, at 110 (suggesting the two are tautologous); Poutsma,

the requirement that a state fund a “*thorough and efficient*” school system¹¹⁴ may suggest an intermediate level of funding: less than would be required with “thorough” standing alone, but more than would be required with just “efficient.”

Thus the terms in a hendiadys may be related in multiple ways. One term may modify the other, or the terms may be joined in a more subtle or complex relationship, sometimes one that is ambiguous or even mysterious. We may be uncomfortable with thinking of such ambiguity and mystery in legal texts, but their presence is more intelligible when one thinks of drafting compromises and of the fact that sometimes language is a limit. Sometimes one cannot put the point more precisely, or if one tried it would be over-precise, or faux precise, as in a rule that everyone knows is really a standard.

II. “CRUEL AND UNUSUAL”

The last Clause of the Eighth Amendment is often read as prohibiting punishments only if they are both cruel and unusual. But the phrase “cruel and unusual” may be read as a hendiadys in which the second term modifies the first: “unusually cruel.” There is strong evidence that “unusual” is a term of art in the Eighth Amendment, meaning “contrary to long usage.”¹¹⁵ Given that evidence, the hendiadys can be glossed as “innovatively cruel.”¹¹⁶ This is a clear and simple reading. It solves the difficult problem of how “cruel” and “unusual” are related, and it fits the evidence, sparse as it is, about the historical purpose of the Cruel and Unusual Punishments Clause.¹¹⁷ In sum, if the phrase is read as a hendiadys, the Clause would prohibit new cruelty in punishment.

A. The Modern Trend to Read the Terms as Separate Requirements

The Eighth Amendment contains several prohibitions:

supra note 32, at 290 (“= the advice of, or contained in, my former lecture.” (emphasis omitted)).

¹¹⁴ See supra note 85 and accompanying text.

¹¹⁵ See Stinneford, supra note 14.

¹¹⁶ In this Article, “innovative” is understood to be synonymous with “contrary to long usage.” Drawing and quartering would not be unprecedented in its cruelty, but it would be innovative in its cruelty.

¹¹⁷ See Hershenov, supra note 13; Stinneford, supra note 14, at 1800–10.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.¹¹⁸

The text of the Eighth Amendment is understood by some as prohibiting punishments that meet two requirements: they are “cruel” and they are “unusual.” That view has roots in some cases from the late nineteenth and early twentieth centuries,¹¹⁹ and it has more recently been advanced by Justices Scalia, Thomas, and Breyer.¹²⁰ Scholars who have considered the relationship of these terms in detail, especially Professor David Hershenov and Professor Meghan Ryan, also reach the conclusion that “cruel” and “unusual” are separate requirements.¹²¹ Other scholars have addressed the question in passing, ones as diverse in their methodology of constitutional interpretation as Professors Akhil Amar, Bradford Clark, Ronald Dworkin, and John Hart Ely: They, too, have described the Clause as prohibiting only punishments that are both cruel and unusual.¹²²

¹¹⁸ U.S. Const. amend. VIII.

¹¹⁹ See *In re Kemmler*, 136 U.S. 436, 447 (1890); cf. *U.S. ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting) (“And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the Eighth Amendment?”).

¹²⁰ *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting) (“The Eighth Amendment forbids punishments that are cruel and *unusual*.”); *Helling v. McKinney*, 509 U.S. 25, 42 (1993) (Thomas, J., dissenting) (“a party must prove . . . that the challenged conduct was both cruel and unusual”); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.) (describing the Eighth Amendment as “forbidding ‘cruel and unusual punishments’”); *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989) (plurality) (“The punishment is either ‘cruel and unusual’ (i.e., society has set its face against it) or it is not.”), overruled by *Roper v. Simmons*, 543 U.S. 551 (2005); see also Scalia & Garner, *supra* note 6, at 116 (“[T]he *and* signals that cruelty or unusualness alone does not run afoul of the clause: The punishment must meet both standards to fall within the constitutional prohibition.”).

¹²¹ See Hershenov, *supra* note 13, at 83–85; Ryan, *supra* note 13; Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. Mem. L. Rev. 465, 469 (2008); see also Stinneford, *supra* note 17, at 972 (“If a punishment is found to be unusual, the next question is whether it is cruel.”).

¹²² John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 14 (1980); Akhil Reed Amar, *America’s Lived Constitution*, 120 Yale L.J. 1734, 1777–79 (2011); Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 Notre Dame L. Rev. 1149, 1200 (2006); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1253 (1997); Ronald Dworkin, *Comment*, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 115, 120 (1997); see also Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual”*, 74 U. Cin. L. Rev. 819, 831–32 (2006) (treating the text of the Eighth Amendment as if punishments were prohibited only if both “cruel” and “unusu-

There are judges and scholars who resist that conclusion, but they usually concede that their view is in some tension with the text.¹²³ It is true that the U.S. Supreme Court has not structured its recent decisions on the Clause in terms of two requirements.¹²⁴ But those decisions have only a tenuous connection to the constitutional text;¹²⁵ they rest primarily on other modalities of constitutional interpretation.¹²⁶

The preceding sketch is not quite complete, for two scholars—Professors John Stinneford and Kent Greenawalt—have maintained that the terms are related in some way, even “interlocked.”¹²⁷ Even so, to the extent that courts and commentators derive their conclusions about the Eighth Amendment from the fine grain of the text, it is widely thought that “cruel” and “unusual” are independent requirements.

al,” though also, inconsistently, suggesting the first term is adverbial). Other scholars speak of “cruel” and “unusual” independently, though without explicitly saying that the Eighth Amendment prohibits only punishments that are both. E.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harv. L. Rev. 109, 126 (2005).

¹²³ E.g., *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (“Although the Eighth Amendment literally reads as prohibiting only those punishments that are both ‘cruel’ and ‘unusual,’ . . .”); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 883 n.3 (2009) (“The conjunction ‘and’ in ‘cruel and unusual’ notwithstanding . . .”); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 491 (2005) (“The Justices sometimes have said that an unconstitutional punishment must be both cruel and unusual, just as the literal text provides.”).

¹²⁴ For example, in *Graham v. Florida*, 560 U.S. 48 (2010), apart from quotations, the majority opinion only used the words *cruel* and *unusual* as part of the phrase “cruel and unusual.” See also Stacy, *supra* note 123, at 491 (noting that “the Justices have made conflicting declarations about the relationship between the terms ‘cruel’ and ‘unusual’”).

¹²⁵ Corinna Barrett Lain, *Lessons Learned from the Evolution of “Evolving Standards,”* 4 Charleston L. Rev. 661, 673–74 (2010).

¹²⁶ Cf. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. Chi. L. Rev. 859, 864 (2009) (finding the U.S. Supreme Court’s “modernization approach” to the Cruel and Unusual Punishments Clause to be just “one among many plausible ways to interpret the text” and suggesting that where it has “take[n] root” is in judicial precedent).

¹²⁷ Kent Greenawalt, *Interpreting the Constitution* 113, 119 (2015) (noting that at the Founding “the inquiries about the two terms were apparently seen as interlocked”); Stinneford, *supra* note 17, at 968–69 (treating a punishment that is “unusual,” in the sense of contrary to long usage, as presumptively “cruel”); cf. Hugo Adam Bedau, *Death is Different: Studies in the Morality, Law, and Politics of Capital Punishment* 96 (1987) (accepting what he describes as the Supreme Court’s treatment of the phrase as if it were “a ligature, ‘cruel-and-unusual punishments,’ designating a complex of intertwined and inseparable properties”). Professor Caleb Nelson once reserved the question whether the phrase was “a term of art” that could not “usefully be broken down into its individual components.” Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 545 n.120 (2003).

B. Textual Difficulties with Reading the Terms as Separate Requirements

It is possible to read “cruel” and “unusual” as separate requirements that must both be met for a punishment to be prohibited. But when the terms are read that way certain difficulties emerge. Consider briefly the two terms in the Clause.

Cruel is ambiguous, in the technical sense of having multiple meanings. It might be a word about extremity; cruel punishments would be ones that are “exceptionally brutal”¹²⁸ or “inhuman.”¹²⁹ Or *cruel* might refer to an absence of justification. Then cruel punishments would be ones that inflict pain “without good reason.”¹³⁰ Or it might refer to punishments that are disproportionate to the offense.¹³¹ Or it might refer to punishments that reflect “the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims.”¹³² Each of these conceptions is evaluative, and each has something like an implicit adverb: *cruel* is taken to mean inhumanly cruel, unjustifiably cruel, disproportionately cruel, or malevolently cruel. Yet it is not obvious that the word must be limited this way. It could be taken, as David Hershenov has argued, to mean something harsh, without any implication of wrongfulness.¹³³ In that case, it would

¹²⁸ Meghan J. Ryan, *Judging Cruelty*, 44 U.C. Davis L. Rev. 81, 124 (2010).

¹²⁹ *In re Kemmler*, 136 U.S. 436, 447 (1890).

¹³⁰ Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1043–44 (1978); see *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Powell, Stewart, & Stevens, JJ., plurality opinion). For critique, see Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 736–42 (2005).

¹³¹ See *Graham v. Florida*, 560 U.S. 48, 60 (2010), modified (July 6, 2010) (if “‘grossly disproportionate,’ the sentence is cruel and unusual” (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991))).

¹³² John Kekes, *Cruelty and Liberalism*, 106 *Ethics* 834, 838 (1996); see also Dolovich, *supra* note 123, at 924–26 (understanding “cruelty” to include indifference to the suffering of others).

¹³³ Hershenov, *supra* note 13, at 78–81. Bedau says that “judging a punishment to be cruel is already condemning it strongly, [and] the idea of a ‘tolerably cruel punishment’ verges on an oxymoron.” Bedau, *supra* note 127, at 96. But Hershenov provides numerous examples to the contrary from contemporary English speech, as well as an example from the brief debate over the Eighth Amendment. Scholars who look to definitions of the word *cruel* in early dictionaries tend to give less attention to the relatively mundane glosses, such as “causing pain” or “destructive” and “causing pain, grief, or distress.” See Ryan, *supra* note 128, at 121; Stinneford, *supra* note 17, at 911. In Dr. Johnson’s *Dictionary*, the entry for *cruel* contains the following definition for “things”:

apply to most punishments, whether in the eighteenth century or the twenty-first.

Unusual might seem to be an odd way to constrain punishment.¹³⁴ Yet as John Stinneford's recent work shows, the word had two different senses at the Founding. One sense was about frequency. For it, the glosses include "rare," "uncommon," and "out of the ordinary."¹³⁵ But in law the word could also be a term of art meaning "contrary to long usage" or "contrary to immemorial usage."¹³⁶ Stinneford has advanced strong evidence and arguments for "unusual" being a term of art in the Eighth Amendment.¹³⁷ Given the strength of Stinneford's work, the premise here is that "unusual" is used as a term of art.¹³⁸

Now fit "cruel" and "unusual" together. First consider "cruel" as an evaluative term, one that could be glossed, for example, as "unjustifiably severe."¹³⁹ The phrase might then refer to punishments that are (1) unjustifiably severe and (2) innovative. But once "cruel" is given an evaluative meaning, it becomes harder to understand why there is a separate requirement that the punishment be innovative. Why would the Eighth

2. [Of things.] Bloody ; mischievous ; destructive ; causing pain.

Consider mine enemies ; for they are many, and they hate me with *cruel* hatred. *Psalms* xxv.19.

We beheld one of the *cruelest* fights between two knights, that ever hath adorned the most martial story. *Sidney*.

1 Johnson, *supra* note 69 (CRUEL). Similarly, the preamble to the Pennsylvania Constitution of 1776 condemns King George's "most cruel and unjust war," Pa. Const. of 1776, pmb1—a formulation which simultaneously suggests that cruelty is a matter of degree and that what was "cruel" was not necessarily considered "unjust."

¹³⁴ Cf. Bedau, *supra* note 127, at 97 ("Were we to try to isolate the unusualness of a punishment from its cruelty, we would focus on a property of punishments that has little or nothing to do with moral condemnation.").

¹³⁵ Stinneford, *supra* note 14, at 1767.

¹³⁶ *Id.* Ronald Dworkin once speculated about a term in the Cruel and Unusual Punishments Clause having a different meaning now than it did at the Founding, but in his hypothetical the term was *cruel*. Ronald Dworkin, Bork's Jurisprudence, 57 U. Chi. L. Rev. 657, 661–62 (1990). According to Dworkin, the sense of the term that would control would be the one from the eighteenth century. *Id.* at 662.

¹³⁷ See Stinneford, *supra* note 14, at 1766–815. Stinneford leaves no doubt about his conclusion. Referring to the "contrary to long usage" sense of "unusual," he says: "This is the only plausible meaning of the word as used in the Eighth Amendment." *Id.* at 1810.

¹³⁸ Without that premise the phrase may still be read as a hendiadys. See *infra* text accompanying notes 173–78.

¹³⁹ As noted above, a variety of evaluative glosses of "cruel" are possible, and only one is given here for simplicity. The argument works equally well if another evaluative gloss is used.

Amendment not prohibit *all* unjustifiably severe punishments, instead of prohibiting only those unjustifiably severe punishments that also happen to be new?¹⁴⁰ Unsurprisingly, then, scholars who take the first term of the phrase as evaluative tend to sideline the second term.¹⁴¹

As already noted, “cruel” can also be taken as a broader and more descriptive term, something like “harsh.”¹⁴² Read as two requirements, the phrase would refer to punishments that are (1) harsh and (2) innovative. On this understanding, most punishments would be harsh. What would sort the constitutional harsh punishments from the unconstitutional harsh punishments would be innovation. But there is a problem. A new punishment may be less harsh than what came before, but still be harsh. If most punishments are “cruel” and new punishments are by definition “unusual,” then the Clause would prohibit almost all new punishments—even ones that are *less* cruel than the punishments they replace.¹⁴³ It is hard to see why the Eighth Amendment would prohibit nearly all innovation in punishment.¹⁴⁴

In sum, when the phrase “cruel and unusual” is understood as having two separate requirements that must be met for a punishment to be prohibited, there are textual oddities. Either one term seems superfluous, or the Clause prohibits even ameliorative development in punishment. The

¹⁴⁰ Exactly the same point could be made if “unusual” were taken to refer to frequency. If the death penalty is cruel, why does it matter that it is rare? But cf. *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting) (taking the term “unusual” to refer to frequency of use and stating that “[t]he Eighth Amendment forbids punishments that are cruel and *unusual*”).

¹⁴¹ E.g., Dolovich, *supra* note 123, at 883 n.3 (“What seems hard to credit is the notion that a given punishment should be judged constitutional however cruel it may be, so long as its use is sufficiently widespread.”). Stinneford is an exception.

¹⁴² See Hershenov, *supra* note 13, at 78–81; see also Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 *Calif. L. Rev.* 839, 860 (1969) (suggesting that *cruel* once “had a less onerous meaning,” and offering as synonyms from seventeenth and eighteenth century English “severe,” “hard,” and “excessive”); *supra* note 133 and accompanying text (noting Dr. Johnson’s definition of *cruel*).

¹⁴³ Hershenov tries to avoid this objection to his broad reading of “cruel,” but not persuasively. See Hershenov, *supra* note 13, at 94 n.27.

¹⁴⁴ Note that the same difficulties just described also apply if “unusual” is taken to refer to frequency or distribution, not innovation. If “cruel” is an evaluative term, it would be odd to make frequency or distribution the criterion for sorting between the unjustifiably severe punishments that are constitutional and the ones that are not. See Dolovich, *supra* note 123, at 883 n.3. If “cruel” is taken as meaning only harsh and “unusual” is understood as a term about frequency or distribution, the Clause would turn out to be a prohibition either of rare punishments or of unevenly applied punishments.

terms might appear to be separate requirements, but if they are read apart, they do not work well together.

There is a further problem with the two-requirements reading. The prohibited punishments are ones that merely happen to be both cruel and unusual. The Clause might not prohibit death by hanging, but it would prohibit the same old hanging with a newly invented microfiber rope.¹⁴⁵ The scope of the prohibition would turn on an accident, a mere coincidence. Is there another way to understand the relationship of these terms?

C. Reading “Cruel and Unusual” as a Hendiadys

A reader who has made it to this point knows what comes next: “cruel and unusual” can be read as a hendiadys. That is, “cruel and unusual” can be read not as two separate requirements, but as a single complex expression. The hendiadys is a straightforward instance of the second term modifying the first, like Virgil’s “we drink from cups and gold” (i.e., “we drink from golden cups”). Read as a hendiadys, “cruel and unusual” would mean “unusually cruel.”¹⁴⁶ If “unusual” is taken as a term of art meaning “contrary to long usage,” then the hendiadys would mean “innovatively cruel.”¹⁴⁷

If “cruel and unusual” means “innovatively cruel,” then there are no sequenced inquiries into whether a punishment is “cruel” and then “unusual.” There is a single inquiry into innovation in cruelty. It is true that one could break this single inquiry into two analytical steps. First, is this punishment innovative? Second, does this punishment’s innovation increase cruelty? Yet that is very different from the two steps associated with a two-requirements view. Those who see the phrase as containing two requirements typically ask first whether a punishment is cruel and

¹⁴⁵ For the pithy expression I thank Steve Sachs.

¹⁴⁶ A suggestion along these lines was made in passing in Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 638 n.16 (1966) (“‘Unusual’ is probably best thought of as adverbially modifying ‘cruel.’”), and it was repeated in Mannheimer, *supra* note 122, at 831–32. But see Bedau, *supra* note 127, at 96 (raising and rejecting this possibility). In addition, Corinna Barrett Lain suggests that in older cases “the words ‘cruel’ and ‘unusual’ were read as one, prohibiting punishments that were unusually cruel.” Lain, *supra* note 125, at 665. But what she has in mind is something quite different from the reading here—not a prohibition on cruel innovation, but only a prohibition on torture.

¹⁴⁷ If “unusual” refers to frequency, the phrase can still be read as a hendiadys. See *infra* text accompanying notes 173–78.

then whether it is unusual, treating the two as distinct and unrelated inquiries.¹⁴⁸ But if the phrase is taken as a hendiadys, as an essential unity, then these two inquiries—is the punishment innovative? and does the innovation increase cruelty?—are not really distinct at all. One tells the interpreter to look for innovation; the other tells the interpreter what type of innovation to look for.

In short, if the phrase is taken as a hendiadys, the prohibited punishments would not be ones that merely happen to be both cruel and unusual.¹⁴⁹ Rather, the Clause would prohibit punishments that are new *in their cruelty*. A new, more painful form of capital punishment; a new, more damaging mode of incarceration (perhaps such as solitary confinement); a new, more demeaning restriction on the freedom of movement of released offenders—all would be “innovatively cruel.”

Two implementing questions would be especially important. First, the baseline: punishments are prohibited if they are new in their cruelty *compared to what*? One could try to identify innovation relative to the baseline of 1791 for the national government (under the Eighth Amendment), and 1791 or 1868 for the state governments (under the Eighth Amendment as incorporated by the Fourteenth Amendment).¹⁵⁰ Or one could try to identify innovation relative to “long usage,” a kind of rolling tradition that from any moment in time stretches backwards a few decades, generations, or centuries.¹⁵¹ If “unusual” is a term of art for “contrary to long usage,” then this approach is the right one. “Unusual” would not point to punishment practices in a particular year. Rather, it would point to traditional punishment practices, and a tradition can change.¹⁵²

¹⁴⁸ Stinneford reverses the order, first asking if the punishment is unusual and then if it is cruel. Stinneford, *supra* note 17, at 972. Although he takes a finding that a punishment is “unusual” as evidence that it is also “cruel”—and to that extent does not divorce the inquiries—he still treats “cruel” as a distinct question that “involves an exercise of the Court’s own judgment.” *Id.*

¹⁴⁹ For a parallel point about “necessary and proper,” see *infra* text accompanying note 297.

¹⁵⁰ See *Robinson v. California*, 370 U.S. 660, 667 (1962).

¹⁵¹ Cf. Stinneford, *supra* note 17, at 968–72 (“[W]hat the Court should really be asking is whether the punishment meets the standards that have prevailed up until today.” (emphasis omitted)).

¹⁵² See Greenawalt, *supra* note 127, at 113 (“If ‘long usage’ is assessed at the time of a modern court’s decision rather than what was being done in 1791, this approach also allows a particular form of evolution over time.”).

Second, should an interpreter look to whether there is innovative cruelty relative to punishments generally or relative to punishments for this particular crime? This question cannot be resolved here, but the reception of the case of Titus Oates would suggest the latter. His punishments were considered “cruel and unusual,” not because they were contrary to long usage generally, but because they were contrary to long usage as punishments for the crime of perjury.¹⁵³

As far as the text of the Eighth Amendment goes, it is straightforward to read “cruel and unusual” as a hendiadys meaning “innovatively cruel.” A hendiadys often works like this, with one term in effect modifying the other.¹⁵⁴ In this hendiadys, the two terms “cruel” and “unusual” work together so closely and well that their order in the gloss could even be reversed: “cruelly innovative.” Either way, the meaning is the same.

But can anything else be said for this reading besides its textual plausibility? First, the “innovatively cruel” reading fits the evidence, slender as it is, for why the Cruel and Unusual Punishments Clause was included in the Bill of Rights.¹⁵⁵ It appears to have been meant to check the possibility that new, more savage punishments would in the future be

¹⁵³ See *id.* at 112–13 (concluding that the “more convincing account” of why Oates’s punishments were cruel and unusual is “that the punishment was out of proportion for the crime of perjury and was not contemplated by the common law or by statute *for that crime*”). There would of course be further questions—how long exactly is long or immemorial usage, what counts as an aberration not altering the tradition (for example, Titus Oates), whether usage is determined at the time of the offense or the time of sentencing, and so on. Questions like these are not unique to a hendiadic reading. They are inevitable where the governing law is vague and has to be made more precise through the resolution of cases.

¹⁵⁴ See *supra* Part I.

¹⁵⁵ On “unusual” in English and early American law, see Stinneford, *supra* note 14, at 1766–815. At the Founding some state constitutions prohibited punishments that were “cruel,” some “cruel or unusual,” and some “cruel and unusual.” Stinneford offers a good explanation for why these would all be roughly similar, and his argument is strengthened by the hendiadic reading offered here. If there was a consensus that “the government should not impose cruel punishments” and that “the common law was essentially reasonable, so that governmental efforts to ‘ratchet up’ punishment beyond what was permitted by the common law were presumptively contrary to reason,” *id.* at 1798–99, then there would not be much difference between prohibiting cruel punishments (as determined by their being contrary to long usage), cruel or unusual punishments (largely overlapping concepts), or cruel and unusual punishments (a hendiadys). Even though sharp distinctions should not be drawn between these formulations, it remains true that each has a different range of interpretive possibilities.

invented or borrowed from civil-law countries.¹⁵⁶ It was a response to a charge made by Anti-Federalists such as Abraham Holmes and Patrick Henry. In the Massachusetts ratifying convention, Holmes warned that under the unamended Constitution, Congress would be “nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes.”¹⁵⁷ In the Virginia ratifying convention, Henry warned that Congress could invent or borrow “unusual punishments,”¹⁵⁸ and he condemned the proposed Constitution of the United States because it failed to restrain congressional invention. By contrast, he praised the Virginia Declaration of Rights for its prohibition on “cruel and unusual punishments.”¹⁵⁹ (That provision of the Virginia Declaration of Rights would later be described as having been “framed . . . so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment.”¹⁶⁰) There was even a point of common ground with James Iredell, an opponent of including a constitutional prohibition on “cruel and unusual punishments.” Iredell assumed that the goal would be to constrain cruel innovation, and he disagreed with the Anti-Federalists only about whether a constitutional prohibition would in fact achieve that goal.¹⁶¹

The fears expressed by the Anti-Federalists were not without foundation. Indeed, the first Congress prescribed the death penalty for anyone convicted of murder in a place under exclusive federal jurisdiction—adding, for the benefit of science and for greater deterrence, that the

¹⁵⁶ See Hershenov, *supra* note 13; Stinneford, *supra* note 14, at 1800–10; see also Stinneford, *supra* note 17, at 943–47 (surveying the concerns that led to the Eighth Amendment).

¹⁵⁷ 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 109–11 (Jonathan Elliot ed., 2d ed. Philadelphia, J. B. Lippincott Co. 1891).

¹⁵⁸ See Stinneford, *supra* note 14, at 1803–08 (examining Patrick Henry’s arguments).

¹⁵⁹ *Id.* at 1806–07.

¹⁶⁰ *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 450 (1824).

¹⁶¹ James Iredell (“Marcus”), Answers to Mr. Mason’s Objections to the New Constitution, in 5 The Founders’ Constitution 376 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund reprt. 1987) (1788). Iredell thought a general prohibition would be too vague, and a list of prohibited punishments would fail of its purpose: “[I]f our government [were] disposed to be cruel their invention would only [be] put to a little more trouble.” *Id.* at 376.

court could require “that the body of [the] offender . . . be delivered to a surgeon for dissection.”¹⁶²

In other words, the concern behind the Cruel and Unusual Punishments Clause was about progress. But it was not Herbert Spencer’s view of social progress as much as it was William Hogarth’s view of the rake’s progress.¹⁶³ Times change and things can go downhill, and when they do, there needs to be something in the Constitution to resist the devolving standards of decency.¹⁶⁴

A slide into severe punishments was not, however, thought to be inevitable. Although there was little discussion of the Cruel and Unusual Punishments Clause at the time of its ratification, what discussion there was shows a more subtle, two-sided view of innovation: Legislators should be constrained from innovations that increase cruelty, but they should be encouraged to adopt innovations that ameliorate it.¹⁶⁵ The reading given here exactly fits that two-sided view: “Cruel and unusual”

¹⁶² David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, at 95 (1997) (quoting 1 Stat. 113); cf. Simon Devereaux, *Inexperienced Humanitarians? William Wilberforce, William Pitt, and the Execution Crisis of the 1780s*, 33 L. & Hist. Rev. 839, 853–70 (2015) (describing the circumstances behind the Felons Anatomy Bill proposed in Parliament in 1786). On more recent innovations in cruelty, see Stinneford, *supra* note 14, at 1754–55; see also Stinneford, *supra* note 17, at 969–70 (“The government has a pronounced tendency to react to perceived crises by ratcheting up the harshness of punishments.”).

¹⁶³ Compare Herbert Spencer, *Social Statics: Or, the Conditions Essential to Human Happiness Specified, and the First of Them Developed* 65 (London, George Woodfall & Son 1851) (“Progress, therefore, is not an accident, but a necessity . . . [T]he things we call evil and immorality [must] disappear; so surely must man become perfect.”), with William Hogarth, *A Rake’s Progress* in Sir John Soane’s Museum, London (1732–1733).

¹⁶⁴ Whatever the present merits of these two views—the Court as a pathfinder for evolving standards, and the Court as a pathblocker for devolving standards—the pathfinder conception is almost inconceivable for the Eighth Amendment before incorporation. Of course these are not the only possible views of the Cruel and Unusual Punishments Clause. The Clause could be understood as requiring judges to undertake a moral analysis of cruelty that is independent of popular views and legislative enactments, whether past or present. That view has difficulty, however, with the word *unusual*.

¹⁶⁵ See, e.g., 1 *The Debates and Proceedings in the Congress of the United States* 754 (Joseph Gales ed., Washington, Gales & Seaton 1834) (Rep. Livermore) (speaking against the Eighth Amendment, but stating that “[i]f a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it”). The same two-sided view of innovation in punishment can be found in the Pennsylvania Constitution of 1776, but it took a different tack: instead of prohibiting innovation that led to more cruelty, it encouraged innovation that led to less cruelty. See Pa. Const. of 1776, §§ 38–39.

is a hendiadys that prohibits not all innovation in punishment, but only innovation that brings new cruelty.¹⁶⁶

Second, this reading can lead to an inquiry that is better suited to judicial decision making. What makes this second advantage possible is that a hendiadic reading of the phrase allows a broad, non-evaluative reading of “cruel.” If “cruel” is taken as an evaluative term, judges are forced to make absolute judgments about what is or is not cruel. That is a difficult question. Of course some punishments are more cruel than others, but the point of difficulty is the constitutional cut-off. If punishments are being judged on whether they are cruel in a sense like “unjustifiably cruel” or “malevolently cruel”—then the question is an inescapably moral one, a question on which individual judgments are likely to vary widely.¹⁶⁷ If the question is shifted to an inquiry into the subjective intentions and knowledge of government officials, that inquiry too is one on which individual judgments will diverge.¹⁶⁸ Nor is the question made easier by directing it towards a moment in history, as in, “What was considered cruel in 1791?” That is still an abstract moral question,¹⁶⁹ yet with the added difficulty of being a question the present is asking of the past.

But the judicial task changes if the phrase is read as a hendiadys and “cruel” is understood in the sense of “harsh.” If what sorts the constitutional punishments from the unconstitutional ones is not whether they are “unjustifiably cruel,” but whether they are “innovatively harsh,” then the judicial inquiry is a comparative one. Judges would not be determining the quantum of cruelty that is constitutionally permissible, but they would instead be asking whether a punishment shows innovation in its harshness. This task is comparative, and such a task tends to be more amenable to judicial competence.¹⁷⁰

¹⁶⁶ Cf. Stinneford, *supra* note 17, at 970 (“The English and early American case law confirms that both versions of the Cruel and Unusual Punishments Clause were directed at *new punishments that were harsher than permitted by prior practice*.” (emphasis added)).

¹⁶⁷ Hershenov, *supra* note 13, at 81–82. For agreement that American society is divided but disagreement about the implication, compare Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 57–61 (2014), with Radin, *supra* note 130, at 1064.

¹⁶⁸ See Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. Crim. L. & Criminology 1353, 1404 (2008).

¹⁶⁹ See Antonin Scalia, *Response*, in Scalia, *supra* note 122, at 129, 145.

¹⁷⁰ This can be seen in how judges sometimes take a seemingly absolute inquiry and turn it into a relative one. For example, a plaintiff seeking an equitable remedy must show that there is “no adequate remedy at law.” In practice judges treat the inquiry as a comparative one: not “are the legal remedies adequate?” but “are the legal remedies *more* adequate?” See

The hendiadic reading given here builds on the work of two scholars who have offered close readings of the text of the Eighth Amendment, namely David Hershenov and John Stinneford.¹⁷¹ Both present evidence that the evil towards which the Clause was directed was the invention of savage punishments in the future. Both skillfully analyze the Clause. But each struggles with some aspect of the Clause because of trying to take “cruel” and “unusual” as separate requirements.¹⁷² The reading given in this Article has the strengths of Hershenov’s and Stinneford’s work without the textual weaknesses. It keeps their insights about each term, and it shows that the Clause is well-designed to constrain the creation of future punishments. Understanding the phrase as a hendiadys avoids needless complexity, as well as the danger that the Clause would prohibit nearly all change in punishment.

It should be noted that the phrase could be read as a hendiadys without “unusual” being a term of art. “Unusual” could be taken as a term about frequency.¹⁷³ The hendiadys would mean “uncommonly cruel,” and it would be a prohibition on punishments that show a degree of cruelty that is rare, as measured against some baseline. A variety of different baselines would be imaginable: 1791 (Justice Scalia¹⁷⁴), states right now (Justice Kennedy, sometimes¹⁷⁵), liberal democracies right now

Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 584 (2016) (“[W]hen a court considers the adequacy of legal remedies, it takes into account a range of considerations . . . such as ‘the burden an injunction will place on the court.’” (quoting Emily Sherwin et al., *Ames, Chafee, and Re on Remedies* 410 (2012))).

¹⁷¹ See Hershenov, *supra* note 13; Stinneford, *supra* note 14; Stinneford, *supra* note 17. There is of course a large body of scholarship on the Cruel and Unusual Punishments Clause that does not examine the original understanding. E.g., Lee, *supra* note 130.

¹⁷² In more detail: Hershenov argues persuasively that “cruel” is not a highly restrictive term and that “unusual” is what sorts the cruel punishments that are constitutionally permissible from the ones that are not. But he is less convincing in his reading of “unusual” as “the subjective expectation that something is uncommon.” And he struggles to avoid the implication of his reading that the Clause would prohibit almost all new punishments, even if they ameliorate cruelty. See Hershenov, *supra* note 13, at 94 n.27. Stinneford offers extensive evidence that “unusual” was a term of art for “contrary to long usage.” He recognizes that the Clause is a restriction on “Cruel Innovation” (in the title of Stinneford, *supra* note 17), but he still treats “cruel” as a distinct inquiry, see Stinneford, *supra* note 14, at 972–73. If the phrase “cruel and unusual” is read as a hendiadys, that treatment is needlessly complex.

¹⁷³ See text accompanying *supra* note 135.

¹⁷⁴ See *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (opinion of Scalia, J.) (calling “the ultimate question” about the Clause “what its meaning was to the Americans who adopted the Eighth Amendment”).

¹⁷⁵ See *Kennedy v. Louisiana*, 554 U.S. 407, 422–34 (2008), as modified (Oct. 1, 2008), opinion modified on denial of reh’g, 554 U.S. 945 (2008).

(Justice Kennedy, other times¹⁷⁶), and similarly situated defendants (Justice Douglas¹⁷⁷).

Which baseline is selected would do most of the work in determining the effect of the Clause. Once a baseline was chosen, the judicial task would involve a comparison—an advantage shared with the other hendiadic reading. But the “uncommonly cruel” reading is hard to square with the evidence of how the Clause was originally understood and the evil to which the Clause was directed.¹⁷⁸

Two concluding points. First, the reading given here does not conform to the Court’s recent Eighth Amendment jurisprudence. But that jurisprudence is based on other constitutional modalities. Text is not its strong suit.¹⁷⁹ In one respect, however, this reading does support the recent jurisprudence. In recent cases, a majority of the Justices have been unwilling to read the Clause as having two requirements;¹⁸⁰ that unwillingness is supported by taking the phrase as a hendiadys.

Second, there is an affinity here with those, like Justice Brennan, who would read the Eighth Amendment as embodying a principle. They might find a principle of dignity, or a principle against inhumanity.¹⁸¹ Their principles are vulnerable to a critique that they take flight from the text and never return. But if “unusual” is understood as a term of art, and the Clause is read as a hendiadys, then the principle is no innovation that

¹⁷⁶ See *Graham v. Florida*, 560 U.S. 48, 80–82 (2010), as modified (July 6, 2010).

¹⁷⁷ *Furman v. Georgia*, 408 U.S. 238, 240, 256 (1972) (Douglas, J., concurring); see also Ely, *supra* note 122, at 97, 173; Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 *Harv. J.L. & Pub. Pol’y* 119 (2004).

¹⁷⁸ See Hershenov, *supra* note 13; Stinneford, *supra* note 14.

¹⁷⁹ See Lain, *supra* note 125, at 673–74. One could go further and say that the Court’s Eighth Amendment jurisprudence and the reading given here draw on different conceptions of the purpose of judicial review. David Strauss captures this difference when he asks: “The real question about modernization is whether the proper function of judicial review is to try to correct, rather than simply to facilitate, the operations of democracy.” Strauss, *supra* note 126, at 907.

¹⁸⁰ See *supra* note 124.

¹⁸¹ *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J., concurring) (finding the “primary” principle for determining “whether a particular punishment is ‘cruel and unusual’” to be that it “must not by its severity be degrading to human dignity”); William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, Oliver Wendell Holmes, Jr. Lecture at Harvard University (Sept. 5, 1986), in 100 *Harv. L. Rev.* 313, 330 (1986) (“A punishment is ‘cruel and unusual’ if it does not comport with human dignity.”). Justice Scalia has also described the Eighth Amendment as containing an “abstract principle” against cruelty, but one “rooted in the moral perceptions *of the time*.” Scalia, *supra* note 169, at 145.

heightens the cruelty of punishment. This principle would be one that is derived from a close reading, but not a mechanical reading, of the text itself. This is not to say it is a better principle as a matter of political morality, only that it is closer to “cruel and unusual” in the Eighth Amendment.

* * *

On the reading here, the Cruel and Unusual Punishments Clause is more than a sequence of separate elements. What the Clause prohibits is not punishments that happen to be both cruel and new. Rather, it prohibits punishments that are new *in their cruelty*. “Cruel and unusual” is a principle of no innovation in cruelty, and with this unitary reading, the phrase is more coherent than the sum of its parts.

III. “NECESSARY AND PROPER”

It has recently become common for courts and scholars to insist that the Necessary and Proper Clause authorizes congressional action only if it meets two separate requirements: The action is “necessary” and it is “proper.” Here that reading is considered, and an alternative is offered: “Necessary and proper” is a single unit of meaning, a hendiadys. The Clause affirms that Congress has the incidental powers that accompany its enumerated powers. In the reading given here, the Clause does not draw a sharp line for how extensive those incidental powers are. “Necessary” is a rather strict word, but “proper” serves as a rule of construction to prevent it from being given a meaning that is overly strict. “Proper” is also a reminder that an incidental power must belong to an enumerated power.

A. The Modern Trend to Read the Terms as Separate Requirements

The Necessary and Proper Clause authorizes Congress:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.¹⁸²

¹⁸² U.S. Const. art. I, § 8, cl. 18.

This Clause has been the subject of a vast amount of commentary and a great number of cases.¹⁸³ In recent years, the trend has been towards reading the phrase “necessary and proper” as imposing two requirements on any congressional action that is justified under this Clause: It must be “necessary” *and* it must be “proper.”

In *National Federation of Independent Business v. Sebelius*, where the Court upheld the Affordable Care Act as an exercise of the taxing power, it first held that the statute could not be justified under the Necessary and Proper Clause: “Even if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.”¹⁸⁴ That conclusion built on several prior cases in which the Court had treated the two terms as separate requirements. Under “necessary,” the Court analyzes whether the legislation is conducive to the exercise of an enumerated power,¹⁸⁵ and under “proper” it considers whether the legislation strikes at a provision or principle in the Constitution.¹⁸⁶ As Professor John Manning recently wrote, “the Court now reads the term ‘proper’ as authorization to determine not only whether an act of Congress complies with specified constitutional limitations, but also whether it fits with

¹⁸³ The following sources offer entry points to the literature on the Clause: For a brief survey of major conceptual questions, see Harrison, *supra* note 18, at 1102–09; on the legal background, see Lawson et al., *supra* note 18; Juliana Gisela Dalotto, Comment, American State Constitutions of 1776–1787: The Antecedents of the Necessary [and Proper] Clause, 14 U. Pa. J. Const. L. 1315 (2012); on the drafting history, see John Mikhail, The Necessary and Proper Clauses, 102 Geo. L.J. 1045, 1086–106 (2014); and on the relationship between Congress and the courts in interpreting the Clause, see Manning, *supra* note 3.

¹⁸⁴ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012). In her dissent from the Necessary and Proper Clause holding, Justice Ginsburg did not object to “necessary” and “proper” as separate requirements. *Id.* at 2626–28 (Ginsburg, J., concurring and dissenting).

¹⁸⁵ E.g., *Jinks v. Richland Cty.*, 538 U.S. 456, 462–64 (2003).

¹⁸⁶ E.g., *id.* at 464–65 (finding a law “proper”); *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (finding a law not “proper” because it “violates the principle of state sovereignty” that is “reflected in . . . various constitutional provisions”); *Alden v. Maine*, 527 U.S. 706, 732–33 (1999) (quoting and leaning on *Printz*’s conclusion that laws in violation of state sovereignty are not “proper”); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2105–07 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (treating “proper” as a separate limitation on congressional action); *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment) (noting precedents that affirm that a federal statute violating state sovereignty is not “proper”).

background principles of federalism and, presumably, also separation of powers.”¹⁸⁷

Accompanying this shift in the Court, and providing impetus for it, is a wave of scholarship that has distinguished “necessary” and “proper” on one ground or another. The leading article, by Professor Gary Lawson and Patricia Granger, argues from text and structure that “proper” is a separate requirement.¹⁸⁸ “Proper,” they say, makes the Clause not merely an affirmation of federal power but also a restriction, nothing less than “a textual guardian of principles of separation of powers, principles of federalism, and unenumerated individual rights.”¹⁸⁹

Since Lawson and Granger wrote, many other scholars have argued that “proper” is a separate requirement. Professor Robert Natelson has researched certain aspects of the legal background of the Clause, and he concludes that “proper” is an independent requirement that imports fiduciary duties.¹⁹⁰ “To be proper” a law must “be within constitutional authority, reasonably impartial, adopted in good faith, and with due care—that is, with some reasonable, factual basis.”¹⁹¹ Professor Geoffrey Miller has analyzed the use of “necessary” and “proper” in Founding-era corporate charters; he concludes, more tentatively, that “proper” might be a requirement that Congress consider the effect of its legislation on citizens, much like a requirement of “proper” action compelled corpo-

¹⁸⁷ Manning, *supra* note 3, at 54–55 (footnote omitted); see Eugene Gressman, Some Thoughts on the Necessary and Proper Clause, 31 Seton Hall L. Rev. 37, 44 (2000). For an opinion including separation-of-powers principles in “proper,” see *Zivotofsky*, 135 S. Ct. at 2105–07 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹⁸⁸ Lawson & Granger, *supra* note 6. Lawson and Granger’s article was cited in *Printz*, 521 U.S. at 924. On the antecedents, see Lawson & Granger, *supra* note 6, at 271 n.15. On the article’s influence, see Gary Lawson, Making a Federal Case Out of It: *Sabri v. United States* and the Constitution of Leviathan, 2003–2004 Cato Sup. Ct. Rev. 119, 153–54; John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1987 n.251 (2011).

¹⁸⁹ Lawson & Granger, *supra* note 6, at 271–72. If “proper” required conformity to express constitutional provisions, it would be odd to include that requirement only here and not for all of Congress’s enumerated powers. See David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, at 327 n.297 (1985). Similarly, if “proper” required non-abridgment of the rights retained by the people, it would be odd to confine the requirement only to the exercise of power under the Necessary and Proper Clause. See Michael W. McConnell, Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?, 5 N.Y.U. J.L. & Liberty 1, 8 n.34 (2010).

¹⁹⁰ Robert G. Natelson, The Framing and Adoption of the Necessary and Proper Clause, *in* Lawson et al., *supra* note 18, at 84, 89–91.

¹⁹¹ *Id.* at 119.

rate managers to consider the effect of their actions on shareholders or employees.¹⁹² Professor Stephen Gardbaum argues that “proper” is an independent requirement that national legislation be consistent with federalism; he differs from Lawson and Granger in that he sees the relevance of this federalism principle not so much in protecting areas of exclusive state authority as in moderating federal preemption in areas of concurrent authority.¹⁹³ Professor Randy Barnett suggests that “proper” might channel congressional action towards less intrusive forms, such as “regulating” commerce instead of “prohibiting” it.¹⁹⁴ Professor Ilya Somin argues that “proper” is a separate requirement that “excludes legislation that can only be justified by a line of reasoning that would give Congress unlimited power to impose other mandates, or render large parts of the rest of the Constitution redundant.”¹⁹⁵ And other scholars have embraced, to varying degrees and in varying forms, the suggestion that “proper” has separate force.¹⁹⁶

¹⁹² Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in Lawson et al., *supra* note 18, at 144, 174.

¹⁹³ Gardbaum, *supra* note 3, at 813 n.64.

¹⁹⁴ Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 219–20 (2003) [hereinafter Barnett, *The Original Meaning of the Necessary and Proper Clause*]. For an earlier view, see Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745 (1997) [hereinafter Barnett, *Necessary and Proper*].

¹⁹⁵ Ilya Somin, *The Individual Mandate and the Proper Meaning of “Proper,” in The Health Care Case: The Supreme Court’s Decision and Its Implications* 146, 152 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013). Somin offers an alternative understanding of “proper” as excluding “new claims of authority that are major independent powers.” *Id.* at 159.

¹⁹⁶ See, e.g., Akhil Reed Amar, *America’s Constitution: A Biography* 112–13, 543 n.28 (2005); Balkin, *supra* note 6, at 179; Currie, *supra* note 189, at 163 n.37; Scalia & Garner, *supra* note 6, at 116–17; Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 758 n.46 (1999); Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 49 (2010); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1811 & n.407 (2013); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541, 587 (1994); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 Va. L. Rev. 243, 294 (2011); Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. Rev. 1551, 1607–14 (2011); David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Law-making Power*, 22 Harv. J.L. & Pub. Pol’y 107, 116 (1998); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 Cornell L. Rev. 1, 79 (2003); Andrew Koppelman, *“Necessary,” “Proper,” and Health Care Reform*, in *The Health Care Case*, *supra* note 195, at 105, 111; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 67 n.278 (1994); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2130 (2004); Mikhail, *supra* note 183, at 1132; Richard W. Murphy, *Separation of*

Some scholars have dissented from the ascendant view that the phrase has two requirements. They argue either that “necessary and proper” is a tautology,¹⁹⁷ or, more modestly, that if “proper” is meant to cross-reference other constitutional principles, then the hard work is specifying those principles.¹⁹⁸ But most scholars writing on these cases, even those who reject the Court’s recent applications of “proper,” have not taken issue with the Court’s treatment of the two terms as separate requirements.¹⁹⁹ In short, although it would be an overstatement to say

Powers and the Horizontal Force of Precedent, 78 Notre Dame L. Rev. 1075, 1082 (2003); Michael Stokes Paulsen, Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?, 109 Yale L.J. 1535, 1568 (2000); Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 737; Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 Ala. L. Rev. 1205, 1229 (2014); Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2102 & n.63 (2002); Somin, *supra* note 195, at 146–47; Ilya Somin, Taking Stock of *Comstock*: The Necessary and Proper Clause and the Limits of Federal Power, 2009–2010 Cato Sup. Ct. Rev. 239, 264–65; Ernest A. Young, Is There a Federal Definitions Power?, 64 Case W. Res. L. Rev. 1269, 1284–85 (2014).

¹⁹⁷ Eric Posner and Adrian Vermeule say: “A more plausible reading because a less dramatic one, is just that the phrase ‘necessary and proper’ is an example, among many in the Constitution, of an internally redundant phrase.” Posner & Vermeule, *supra* note 29, at 1728 n.20; see also Powell, *supra* note 29, at 724 n.42 (“It is very likely that Chief Justice Marshall viewed necessary and proper as a pleonasm with the second adjective proper importing no additional, legally significant, or justiciable meaning.”). There is some support for that view. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (argument of Webster); Opinion of Edmund Randolph, Attorney Gen. of the U.S., to President Washington (February 12, 1791), in *Legislative and Documentary History of the Bank of the United States* 86, 89 (M. St. Clair Clarke & D. A. Hall comp., Washington, Gales & Seaton 1832) (doubting whether proper “has any meaning”). For critique, see *infra* note 204.

¹⁹⁸ Evan H. Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1031 n.115 (1995); Posner & Vermeule, *supra* note 29, at 1762 n.20; see also Ernest A. Young, *Alden v. Maine* and the Jurisprudence of Structure, 41 Wm. & Mary L. Rev. 1601, 1628–30 (2000) (making the same point, not as a criticism of Lawson and Granger but as a careful description of their argument).

¹⁹⁹ See, e.g., Koppelman, *supra* note 196, at 111 (criticizing the idea that the mandate was not “proper,” but voicing no objection to the idea of “proper” as a separate requirement); Peter J. Smith, Federalism, *Lochner*, and the Individual Mandate, 91 B.U. L. Rev. 1723, 1736–37 (2011) (same); see also Manning, *supra* note 3, at 48–49, 54–60 (assuming for the sake of analysis that “necessary” and “proper” are separate requirements). Some scholars take “proper” as only requiring conformity with other constitutional provisions—a second requirement, but a minimal one. See Stephen L. Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 U. Pa. L. Rev. 1341, 1378 (1983); Hall, *supra* note 33, at 1852–54 & n.124, 1863. Randy Beck takes “proper” as a second requirement, but only an “internal limitation” that requires close means-end fit, see J. Randy Beck, The New Jurisprudence of the Necessary and Proper Clause, 2002 U. Ill. L.

there is a consensus, many scholars would agree with Professor Richard Epstein about how to approach the Necessary and Proper Clause: “The secret of sound constitutional interpretation is to take it one word at a time, by asking first what is ‘necessary’ and then what is ‘proper.’”²⁰⁰

The reasons for treating “necessary” and “proper” as separate requirements are fairly obvious. Both words are in the Constitution. The separation of these words with *and* seems to indicate a conjunctive reading.²⁰¹ There are alternative readings, but they are unattractive. There is little historical support for reading the phrase “necessary and proper” as a term of art, a known technical usage.²⁰² To read “and” as disjunctive (thus “necessary *or* proper”) is even worse.²⁰³ And to read the phrase as a tautology seems like giving up too quickly.²⁰⁴ It is easy to see why the

Rev. 581, 636–48—a position close to the proprietary sense of “proper” discussed below in Section III.E.

²⁰⁰ Epstein, *supra* note 167, at 211.

²⁰¹ Lawson & Granger, *supra* note 6, at 275–76; Somin, *supra* note 195, at 148.

²⁰² See Harrison, *supra* note 18, at 1116–18; see also Mikhail, *supra* note 183, at 1121 (rejecting the idea that “necessary and proper” is a term of art). The leading work on the legal background of the Clause—Lawson et al., *supra* note 18—treats the phrase as having many antecedents but not as being a term of art. Accord Harrison, *supra* note 18, at 1117; Manning, *supra* note 18, at 1352–53. Contra Mikhail, *supra* note 183, at 1115. Another useful discussion of legal background is Dalotto, *supra* note 183. Dalotto’s work also does not treat “necessary and proper” as a term of art. Nor was “necessary and proper” treated as a term of art in the early debates discussed below, such as the debate over the First Bank of the United States and the essays of Marshall and Roane. Instead, the words were defined individually and then applied as a unit (see, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 418–21)—which is what one would expect for a hendiadys, but not for a term of art.

²⁰³ See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243, 265–67 (2004). Not coincidentally, there has also been a suggestion that “cruel and unusual” might be disjunctive. See Treanor, *supra* note 36, at 499 n.51.

²⁰⁴ Eric Posner and Adrian Vermeule take the phrase as a tautology, and there is support for that view. See *supra* note 197. But there are also difficulties. First, there is ample evidence that “necessary” was understood to be more strict than “proper” as a standard of permissible action. See *infra* notes 242–50 and accompanying text. Second, two synonymous terms might be added at the same time, but the Committee of Detail took a draft with “necessary” and added “and proper”—which is hard to explain if the terms meant the same thing. Accord Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in Lawson et al., *supra* note 18, at 84, 89. Third, the trope of impossible drafting, see *infra* note 278 and accompanying text, is difficult to understand if the terms are interchangeable. The Clause could have had only “necessary” or only “proper,” and if critics of the Constitution feared one word or the other, its supporters could have alleviated their fears by removing the superfluous but offending word. Note that the arguments given in this footnote are about why “necessary and proper” is not best read as a pair of synonyms in Article I of the

view is now widespread that these terms impose two separate requirements, even if there is significant disagreement about what exactly may be the difference between the requirements.

B. Revisiting the Evidence for Two Requirements

Despite the seeming plausibility of the two-requirements reading, there is one point that should give us pause. It is actually hard to find early interpretations that treat “necessary” and “proper” as separate requirements.²⁰⁵ In the ratification debates, that view is unmistakably present in only a single source—a Federalist pamphlet by “An Impartial Citizen.”²⁰⁶ There is also an ambiguous phrase in James Madison’s speech introducing the first amendments to the Constitution. Then there are three sources from the early nineteenth century: an 1811 speech in the House of Representatives, Maryland’s argument in *McCulloch v. Maryland*, and perhaps Spencer Roane’s “Hampden” essays criticizing *McCulloch*. This Section considers these sources, and it then raises the question of how to understand the paucity of early references to two requirements.

The first source treating “necessary” and “proper” as separate requirements was apparently a pamphlet defending the proposed Constitution. The pamphlet responded to George Mason, who had warned that the Necessary and Proper Clause would allow Congress to “grant monopolies in trade, constitute new crimes, inflict unusual punishments, and in short, do whatever they please.”²⁰⁷ In rebuttal, “An Impartial Citi-

U.S. Constitution. Because these words have overlapping semantic ranges, they certainly could be used tautologically, and it seems that in at least some legal texts they were. E.g., sources cited in Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson et al., *supra* note 18, at 52, 77 n.115.

²⁰⁵ See Beck, *supra* note 199, at 638–39 (“[I]t must be said that the historical evidence for treating the propriety requirement as an external limitation on congressional power seems relatively thin.”); McConnell, *supra* note 189, at 8 n.34 (expressing some skepticism of Lawson and Granger’s argument that “proper” protects retained rights, for “[i]t is difficult to know how widespread this interpretation was at the time” and “[t]hose who defended the Constitution without a bill of rights did not take advantage of this argument”).

²⁰⁶ *An Impartial Citizen V*, Petersburg Va. Gazette, Feb. 28, 1788, *reprinted in* 8 Documentary History of the Ratification of the Constitution 428 (John P. Kaminski & Gaspare J. Saladino eds., 1988). Other examples may have eluded me. For contestable ones, see *infra* note 221.

²⁰⁷ *An Impartial Citizen V*, *supra* note 206, at 431. The pamphleteer’s use of “unusual” is further support for Stinneford’s thesis about the term’s meaning. See *supra* notes 135–37 and accompanying text.

zen” objected that “the laws which Congress can make, for carrying into execution the conceded powers, must not only be *necessary*, but *proper*.”²⁰⁸ And, the pamphleteer said, the statutes Mason warned of “would be manifestly *not proper*.”²⁰⁹ This pamphlet takes the Clause as having two requirements, and it understands “proper” as the more restrictive term. It does not offer further analysis; it does not say why Mason’s hypotheticals would fall afoul of “proper.”

The next source to clearly adopt a two-requirements reading appears more than two decades later. In 1811, in a debate over the Second Bank of the United States, Representative William Taylor Barry (later the Postmaster General for President Jackson) argued that “proper” was a distinctive requirement. A proper means was one “confined” to the end, not one “entirely distinct from, and independent of the power to the execution of which it was designed as a mean.”²¹⁰

The third instance came in 1819, in the arguments in *McCulloch*. One of the attorneys for the State of Maryland, Walter Jones, argued that “proper” was a separate requirement. A constitutional means, he argued, “must be, not merely convenient-fit-adapted-proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be *proper*, which are not *necessary*; because the end may be attained without them.”²¹¹

The fourth instance is less certain. It came later in 1819, after *McCulloch* was decided, in the essays published by a leading justice of the Virginia Supreme Court, Spencer Roane, under the name “Hampden.”²¹² In Roane’s extensive criticism of the decision, there is one passage where he glosses *necessary* as “indispensably requisite” and *proper* as “peculi-

²⁰⁸ *An Impartial Citizen V*, supra note 206, at 431.

²⁰⁹ *Id.*

²¹⁰ 22 *Annals of Cong.* 694, 696 (1811) (statement of Rep. Barry).

²¹¹ *McCulloch*, 17 U.S. (4 Wheat.) at 367 (argument of Jones). For David Currie’s inclination towards Jones’s argument that the terms are separate requirements, though not seemingly towards the way Jones read those requirements, see Currie, supra note 189, at 163 n.37; see also *id.* at 326–27 & n.297.

²¹² “Tradition has it that Jefferson intended to appoint Roane” as Chief Justice of the U.S. Supreme Court, “but was forestalled by Ellsworth’s resignation and the appointment of John Marshall by John Adams shortly before Jefferson’s inauguration.” Note, Judge Spencer Roane of Virginia: Champion of States’ Rights—Foe of John Marshall, 66 *Harv. L. Rev.* 1242, 1242 n.4 (1953).

ar.”²¹³ In Roane’s usage, “proper” seems to mean belonging uniquely to,²¹⁴ with the implication that the Necessary and Proper Clause allows the use of an incidental power only if it is connected to exactly one enumerated power. He therefore faults Congress and the Supreme Court for failing to say which of the enumerated powers the bank was uniquely connected with. Roane may be treating the two terms as separate requirements, but that is not clear. He is certainly thinking of both terms as involving some aspect of incidental-powers analysis.²¹⁵ Then Roane moves on quickly from “proper”: his main concern is “necessary.”²¹⁶

In addition, there is a phrase from Madison, in his speech in the House of Representatives presenting what became the Bill of Rights, which might be taken as suggesting the terms are separate requirements. But it is not free from doubt. In describing laws that might make it useful to have a Bill of Rights, Madison notes that Congress might abuse its powers under the Necessary and Proper Clause.²¹⁷ He raises the possibility that laws will “be considered necessary and proper by Congress” when they are in fact “neither necessary or proper.” He then immediately proceeds to give a hypothetical: Congress might consider general warrants to be “necessary” for raising federal revenue.²¹⁸ At this point, if Madison thought “proper” was a separate requirement, one would expect that he would say whether general warrants would be “proper.” He does

²¹³ Roane’s “Hampden” Essays, No. 3 (June 18, 1819), *reprinted in* John Marshall’s Defense of *McCulloch v. Maryland* 106, 125, 133 (Gerald Gunther ed., 1969) [hereinafter Marshall’s Defense] (giving multiple definitions from Dr. Johnson’s *Dictionary* for each word).

²¹⁴ See *id.* at 133.

²¹⁵ *Id.* at 133–35. Roane combines the two terms into a single statement summarizing the Clause: “To justify a measure under the constitution it must, therefore, be either ‘necessary and proper,’ or which is the same thing ‘indispensably requisite’ and ‘peculiar’ to the execution of a given power.” *Id.* at 133.

²¹⁶ Nor was Roane’s point about “proper” taken up by the Virginia General Assembly, when it sent instructions to Virginia’s U.S. Senators about their “concern and alarm” regarding *McCulloch*. The Virginia General Assembly criticized what Chief Justice Marshall did to “necessary,” but not what he did to “proper.” Instructions from the General Assembly of Virginia, to James Barbour and James Pleasants, junr., Senators from the State of Virginia, in the Congress of the United States (Dec. 22, 1819), *in* Journal of the House of Delegates of the Commonwealth of Virginia, Begun and Held at the Capitol, in the City of Richmond, on Monday the Sixth Day of December, One Thousand Eight Hundred and Nineteen 56, 57 (Richmond, Thomas Ritchie 1819).

²¹⁷ James Madison, Amendments to the Constitution (House of Representatives, June 8, 1789), *in* 12 The Papers of James Madison 196, 197, 205 (Charles F. Hobson et al. eds., 1979).

²¹⁸ *Id.* at 205–06.

not. Nor does he mention any possibility of a law being necessary but not proper, or proper but not necessary. Nor does he suggest any way that “necessary” and “proper” differ. In context, then, it is hard to say what exactly Madison meant by “neither necessary or proper.” It certainly could mean that he thought the Clause had two requirements, but it could also be rhetorical or imprecise.²¹⁹ Instead of taking this phrase as the secret key to Madison’s views, the better course is to see what Madison says about the Necessary and Proper Clause more plainly in his other writings, which are considered below.²²⁰

Apart from the phrase from Madison’s speech on the Bill of Rights, the four sources just discussed appear to be the early interpretations that most clearly read the Necessary and Proper Clause as having two requirements.²²¹ All of these sources stand at some distance from the mod-

²¹⁹ Compare the abundant negation in Voltaire’s *bon mot* that the Holy Roman Empire was “neither holy, nor Roman, nor an empire.” The Oxford Dictionary of Quotations 797 (Elizabeth Knowles ed., 5th ed. 1999) (quoting Voltaire).

²²⁰ See *infra* notes 229–30 and accompanying text. Elsewhere Madison asked “Whether any part of the powers transferred to the general government be unnecessary or improper?” The Federalist No. 41, at 268 (James Madison) (Jacob E. Cooke ed., 1961). He proceeded to treat that question as unitary, glossing it as: “[i]s the aggregate power of the general Government greater than ought to have been vested in it?” and answering it without distinguishing “unnecessary” and “improper.” *Id.* Nevertheless, I do not put much weight on this example. It is one of the myriad occurrences of these terms in *The Federalist* that have nothing to do with the Necessary and Proper Clause, and reasoning from “unnecessary” and “improper” to the meaning of “necessary” and “proper” is a mistake, see *infra* note 248.

²²¹ Other early interpretations that are sometimes read to suggest two requirements are doubtful. In some, only a single term is used, either “necessary” or “proper,” but it is not clear whether the source is referring to one of two requirements or is instead using a shorthand for the entire Clause. E.g., The Federalist No. 33, *supra* note 24 (“The propriety of a law in a constitutional light, must always be determined by the nature of the powers upon which it is founded.”); Letter from Thomas Jefferson, to Edward Livingston (Apr. 30, 1800), in 31 The Papers of Thomas Jefferson, 1 February 1799 to 31 May 1800, at 546, 547 (Barbara B. Oberg ed., 2004) (repeatedly using “necessary” in describing the chain of reasoning—in the style of “this is the house that Jack built”—that purported to justify the federal incorporation of a copper mining company). In other instances, both terms (or cognates) are used in close proximity, but the usage appears to be elegant variation or otherwise rhetorical rather than analytic. See, e.g., The Federalist No. 44, *supra* note 2 (“For in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with the object; and be often properly varied whilst the object remains the same.”); James Wilson, Pennsylvania Ratifying Convention, in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, *supra* note 157, at 415, 468 (“Whether it will be proper at all times to keep up a body of troops, will be a question to be determined by Congress; but I hope the necessity will not subsist at all times.”). In addition, Story refers to “necessary” and “proper” distinctly, but he does not

ern two-requirements readings. None of these sources expressly treats “proper” as a textual hook for various other constitutional provisions and principles (e.g., state sovereignty) like Lawson and Granger, *Printz v. United States*, *Alden v. Maine*, or *NFIB*. None of them makes “proper” a font of fiduciary duties, as Natelson argues.²²² Rather, each of these sources seems to treat “proper” as an aspect of incidental-powers analysis.²²³ Some see “proper” as a requirement that a congressional act be “proper to” some particular enumerated power.²²⁴ Note, too, that there is no consistent position in these sources about the relative strength of “necessary” and “proper.”²²⁵

Even more striking is the fact that none of the classic texts on the Necessary and Proper Clause makes a two-requirements argument. This is a silence that speaks. Many of those who argued about the Necessary and Proper Clause in the ratification debates and the debates over the various Banks of the United States would have had strong reasons for advancing a two-requirements reading.²²⁶ Some of the major early interpretations, especially the essays of Hamilton and Madison in *The Feder-*

clearly refer to them as separate requirements. Story, *supra* note 27, § 1248, at 122 (“But if the intention was to use the word ‘necessary’ in its more liberal sense, then there is a peculiar fitness in the other word. It has a sense at once admonitory, and directory. It requires, that the means should be, *bonâ fide*, appropriate to the end.”); see also *id.*, §§ 1232, 1238, at 110, 114 (“If it be not *expressed*, the next inquiry must be, whether it is properly an incident to an express power, and necessary and proper to its execution.”).

²²² See *supra* notes 190–91 and accompanying text.

²²³ For example, in “An Impartial Citizen V,” the sentence immediately prior to the two-requirements point reads:

When a power is vested any where, from the nature of things it must be understood to be attended by such other incidental powers as are necessary to give it efficacy; for to say, that a power is given, without the power of enforcing it, is a solecism in language.

An Impartial Citizen V, *supra* note 206, at 431.

²²⁴ For more on this proprietary sense of “proper,” see *infra* Section III.E.

²²⁵ “An Impartial Citizen V” reads “proper” as more restrictive, while Jones reads it as less so. See An Impartial Citizen V, *supra* note 206, at 431 (arguing that laws made by Congress under the Clause “must not only be *necessary*, but *proper*”); *McCulloch*, 17 U.S. (4 Wheat.) at 367 (argument of Jones) (arguing that “[m]any means may be *proper*, which are not *necessary*”). Representative Barry does not say which he considers more restrictive. But he does seem to accept the narrow view of “necessary” rejected by *McCulloch*, namely that a necessary means is only “*that mean without which the end could not be produced.*” 22 Annals of Cong. 696 (1811) (emphasis added); see *id.* at 697, 699 (glossing “necessary” as “strictly appropriate” and “strictly necessary”).

²²⁶ The exception is the Anti-Federalists, who had no reason to lay stress on two requirements before ratification.

alist, are concerned with persuading others that the Clause has a limited scope;²²⁷ they could have been aided by pointing to not one but two requirements in the Clause. Other major early interpretations tried to limit the scope of the Clause, especially Madison and Jefferson in the debates over the First Bank of the United States;²²⁸ they would have availed themselves of this argument if they had thought of it. Still others, like Chief Justice Marshall in *McCulloch*, wanted a robust national power but also wanted to allay resistance from those who feared an all-powerful national government; they, too, would have had reason to note a second requirement.

But when Hamilton and Madison urged ratification, they did not appeal to “proper” as an independent requirement to assuage the concerns of the state conventions.²²⁹ In the Bank debate, neither Jefferson nor Madison invoked “proper” as a separate hurdle.²³⁰ In fact, not a single

²²⁷ The Federalist No. 33, *supra* note 24; The Federalist No. 44, *supra* note 2.

²²⁸ See Jefferson, *supra* note 19; James Madison, The Bank Bill (House of Representatives, Feb. 2, 1791), in 13 The Papers of James Madison 372 (Charles F. Hobson et al. eds., 1981). On the connection between Madison’s view of the Necessary and Proper Clause and his theory of republican government, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 354–55 (1996).

²²⁹ In The Federalist No. 44, *supra* note 2, for example, Madison argues that the Clause gives only powers that would already exist “by unavoidable implication” from the need to execute the enumerated powers. Although he uses a variety of phrases (“necessary and proper,” “unnecessary or improper,” “not necessary or proper”) he never suggests a particular power might be necessary, or proper, but not both. The one place he alternates the use of the terms appears to be an elegant variation, because repeating “necessarily and properly” in two consecutive clauses would be ungainly. Moreover, when he presented the case for the Bill of Rights in the House of Representatives, he argued that the national government was not sufficiently constrained by the scheme of enumerated powers paired with the Necessary and Proper Clause. 1 Annals of Cong. 431, 438 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison). His example was that general warrants might be “necessary” for collecting revenue. If “proper” were a separate requirement, the logic of Madison’s example would fail: General warrants could be “necessary” but not “proper,” in which case the Constitution would restrain the national government without the addition of a Bill of Rights. Cf. Beck, *supra* note 199, at 638–39 (noting those who argued that a Bill of Rights was unnecessary did not do so on the grounds that “proper” already protected individual liberty).

²³⁰ Thus Madison, in his speech on the Bank bill in the House of Representatives, never discussed separately whether the bill was “necessary” and “proper,” and he glossed the meaning of a power that was necessary and proper in terms that cannot be divided into those terms: For example, “an accessory or subaltern power, to be deduced by implication, as a means of executing another power.” Madison, *supra* note 228, at 379. Similarly, Jefferson attacked the Bank bill as not being “necessary,” with no separate treatment of “proper.” Jefferson, *supra* note 19, at 278. Jefferson did not even point to “proper” when arguing that the Necessary and Proper Clause does not allow Congress to “break down the most antient and

speaker in the House debate over the First Bank of the United States treated “proper” as a distinct requirement.²³¹ In *McCulloch*, Marshall saw no need to raise, nor to resist, the reading of “proper” as a separate limitation on the establishment of a national bank.

In short, none of these classic texts emphasizes a distinction between “necessary” and “proper.” None of them organizes the analysis into two separate steps. To find a clear example of a two-requirements reading, one has to venture to texts that are either peripheral or later or both—the “Impartial Citizen” pamphlet, the speech of Representative Barry in the debate over the Second Bank, Walter Jones’s argument in *McCulloch*, and Spencer Roane’s criticism of *McCulloch*—and these still treat “proper” in ways that diverge sharply from the modern two-requirements reading. The lack of any clear evidence for the two-requirements interpretation in the classic texts should give us pause.²³²

C. Reading “Necessary and Proper” as a Hendiadys

There is a long tradition in American law of reading “necessary” with latitude in the Necessary and Proper Clause.²³³ This was Alexander Hamilton’s position, but one he expressed only *after* the Constitution

fundamental laws of the several states” and to launch “invasions” of “the rights . . . of the states and state legislatures.” Id. at 279–80.

²³¹ The House debate can be found in Legislative and Documentary History of the Bank of the United States, *supra* note 197, at 37–85. Instead, the debate included many arguments about whether the incorporation of a bank would be incidental to any of the enumerated powers of Article I. In addition to Madison’s first speech, cited in the preceding note, see, e.g., Rep. Ames (House of Representatives, Feb. 3, 1791) in Legislative and Documentary History of the Bank of the United States, *supra* note 197, at 45, 49 (arguing in favor of the constitutionality of incorporating a bank on the ground that it was “fairly relative, and a necessary incident to” several constitutional powers).

²³² A further implication of the missing two-requirements reading will become apparent after the hendiadys reading is introduced: If “necessary and proper” had been a studied ambiguity—a response to disagreement about the scope of national power that left open whether or not “proper” should be read as a separate requirement—then Madison and Jefferson would have had strong incentives to argue after ratification that “proper” restricted the national government. That they still did not suggests that they did not think that “necessary and proper” could reasonably be read as containing two requirements.

²³³ There is also a long tradition of reading it more strictly. See, e.g., Jefferson, *supra* note 19, at 278–79 (glossing “necessary means” not as “those which are merely ‘convenient’ for effecting the enumerated powers” but rather as “those means without which the grant of the power would be nugatory”).

was ratified.²³⁴ This is widely thought to be Chief Justice Marshall's position in *McCulloch*.²³⁵ This was Justice Story's position in his *Commentaries*.²³⁶ But the view expressed by Hamilton, Marshall, and Story was a response to this problematic phrase, and first the problem needs to be grasped.

Necessary is a stark word. It had (and still has) a broad semantic range, running from The One Thing We Must Do Or The Sky Will Fall²³⁷ to something like "appropriate."²³⁸ But the breadth of this semantic range should not make us forget the word's usual connotation was stronger than the postratification Federalist position. Professor Mark Graber has said, "[n]o one besides John Marshall and Alexander Hamilton . . . seriously contends that 'necessary . . . means no more than needful, requisite, incidental, useful or conducive to.'"²³⁹

²³⁴ Compare The Federalist No. 33, supra note 24, with Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 The Papers of Alexander Hamilton, February 1791–July 1791, at 97, 102–05 (Harold C. Syrett & Jacob E. Cook eds., 1965). Even so, Hamilton's view was not wide-open. See Barnett, The Original Meaning of the Necessary and Proper Clause, supra note 194, at 206–07. On Hamilton's insistence that means-end fit under the Necessary and Proper Clause is not a question of policy, see infra note 301 and accompanying text.

²³⁵ For doubts about how minimal the reading of "necessary" is in *McCulloch*, see Currie, supra note 189, at 160–68; Gerald Gunther, Introduction, in Marshall's Defense, supra note 213, at 1, 18–21; see also David S. Schwartz, Misreading *McCulloch v. Maryland*, 18 U. Pa. J. Const. L. 1, 72–79 (2015) (noting ambiguities in *McCulloch*); cf. Barnett, The Original Meaning of the Necessary and Proper Clause, supra note 194, at 207–08 ("Even Marshall's opinion in *McCulloch* can be read as taking a more circumspect view of congressional power than is commonly taught."); Martin S. Flaherty, John Marshall, *McCulloch v. Maryland*, and "We the People": Revisions in Need of Revising, 43 Wm. & Mary L. Rev. 1339, 1342 (2002) (critiquing Justice Thomas's less nationalist reading of *McCulloch*, but concluding that it is "wrong for the right reasons").

²³⁶ Story, supra note 27, § 1243, at 118.

²³⁷ See Jefferson, supra note 19, at 278.

²³⁸ For examples from Founding-era corporate charters, see Miller, supra note 192, at 161–62.

²³⁹ Graber, supra note 1, at 168 (quoting Hamilton, supra note 234). Graber has Madison and Amphyctyon on his side. See Madison, supra note 228, at 376–77 (posing a rhetorical question about "whether it was possible" to view terms such as "conductive to" as being "synonymous" with, or even "a fair and safe commentary on," the terms "*necessary* and *proper*"); A Virginian's "Amphyctyon" Essays, No. 2 (Apr. 2, 1819), reprinted in Marshall's Defense, supra note 213, at 64, 65 ("Would they not have said, if they so intended it, that Congress shall have power to make all laws which may be *useful*, or *convenient*, or *conductive* to the effectual execution of the foregoing powers? Will any man assert that the word '*necessary*' is synonymous with those other words? It certainly is not. Why then should we

It is easiest to see the force of this word if one imagines the Necessary and Proper Clause without the words “and proper.” If every congressional act had to be “necessary” for furthering an enumerated power, there might be something like strict scrutiny of most federal statutes. If Congress had any other way to execute the enumerated power, could the statute really be necessary?²⁴⁰ One could think of the members of Congress, every time they passed a statute that did not fall directly under a heading of an enumerated power, as resembling trespassers who break into a cabin for food and have to justify themselves with a necessity defense. The preceding sentence is of course a *reductio ad absurdum*. But that is exactly the form of argument that dominates every one of the classic Federalist statements about the Necessary and Proper Clause.²⁴¹ They would not have presented this parade of horrible limitations unless they needed to. They needed to because *necessary* is a strong word.

None of these classic Federalist arguments invoked a *reductio ad absurdum* about the dangers of rigorously interpreting “proper.” There was no need to. “Proper,” too, had a broad semantic range, but it was less restrictive. This conclusion is supported, for example, by the relative strictness of “necessary” and “proper” as standards elsewhere in the Constitution.²⁴² It is further supported by the use of “necessary” and “proper” in roughly contemporaneous corporate charters.²⁴³

That “proper” is the more lax term is further evident from the controversies over the First and Second Banks. In the debate in the House of

change its meaning?”). For doubts about whether the views of Hamilton and Marshall were quite so lax, see *supra* notes 234–35.

²⁴⁰ Richard Epstein similarly invokes the analogy of tiers of scrutiny in thinking about the Necessary and Proper Clause, and to the same effect: the Clause requires a means-end fit that is at neither end of the spectrum. See Epstein, *supra* note 167, at 218.

²⁴¹ The Federalist No. 44, *supra* note 2; *McCulloch*, 17 U.S. (4 Wheat.) at 416–18; Story, *supra* note 27, §§ 1239–40, at 114–17. *Reductio ad absurdum* also dominates the arguments on the other side, but more on that shortly.

²⁴² “Proper” is consistently used as a lax standard of wide discretion. See U.S. Const. art. I, § 9; id. art. II, § 2; id. art. II, § 3. “Necessary” is a stricter term in Article I, Section 7; Article I, Section 10; Amendment XII (twice); it is the standard for a discretionary but solemn decision in Article V; and it is the stricter term in what is likely another hendiadys in Article II, Section 3, which gives the President the duty of recommending to Congress “such Measures as he shall judge *necessary and expedient*.”

²⁴³ See Miller, *supra* note 192, at 160–62. Miller tries to distinguish “proper” from “necessary” in some way other than degree, but that part of the argument is more conjectural and seems to confuse sense and reference. What his examples demonstrate, at least for the corporate charters, is that “necessary” tended to be a more restrictive term than “proper.” *Id.* at 161.

Representatives, one critic concentrated on the word “necessary,”²⁴⁴ but none concentrated on the word “proper.”²⁴⁵ There is still more evidence from *McCulloch*: Chief Justice Marshall saw “necessary” as a potential threat to effective national government and devoted all of his rhetorical powers to subduing that word; he gave almost no attention to “proper.”²⁴⁶ It is also evident from the criticism of *McCulloch* by those who feared an expansive national government: They concentrated their criticism on how *McCulloch* read “necessary,” not how it read “proper.”²⁴⁷ This pattern of usage and argumentation is exactly what one would expect if “necessary” was understood as the more restrictive word. Lawson and Granger argue otherwise, but their sources are generally unpersuasive in showing that “proper” was the more restrictive term.²⁴⁸

²⁴⁴ Rep. Giles (House of Representatives, Feb. 7, 1791), in *Legislative and Documentary History of the Bank of the United States*, supra note 197, at 69, 72.

²⁴⁵ See supra text accompanying note 229.

²⁴⁶ It has been suggested that the Court did not actually consider “proper” in *McCulloch* “because neither side raised the issue.” Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol’y 849, 875 n.97 (2002). But the entire Clause was at issue. Daniel Webster argued that the two terms were “probably to be considered as synonymous,” and Walter Jones, that the terms were separate requirements. See *McCulloch*, 17 U.S. (4 Wheat.) at 324 (argument of Webster); id. at 367 (argument of Jones). See supra notes 211 & 225 and accompanying text.

²⁴⁷ See supra note 216 and accompanying text.

²⁴⁸ The “Impartial Citizen V” pamphlet does support their view. See Lawson & Granger, supra note 6, at 299 & nn.132–33. But not the other sources they adduce. Some treat “necessary” as more restrictive. Id. at 289–90 & nn.93 & 95 (Spencer, Iredell, Hamilton, Roane). Another says that “proper” qualifies the meaning of “necessary.” Id. at 290 n.95 (Clopton). Two others seem to support their conclusion, id. at 289 & n.93 (Wilson: “not only unnecessary, but improper”; Madison: “improper, or at least unnecessary”), but are inapt for two reasons. First, the semantic ranges of “necessary” and “proper” cannot be determined from the semantic ranges of “unnecessary” and “improper.” In particular, “unnecessary” can mean something gratuitous, which is not a mere negation of “necessary.” Second, in these quotations what is doing the work is not vocabulary but syntax. An English speaker can say “not only x but y,” and either term (“unnecessary,” “improper”) can take either spot. *This construction* does not tell you that one word is stronger or weaker, or more restrictive or less restrictive than the other, only that the meaning of the terms has sufficient plasticity that our expectations for their relationship may be overpowered by clear syntax. Similarly, an English speaker may say, “you listened to me, but you didn’t hear me.” Or “you heard me, but you didn’t listen to me.” Both statements are intelligible and they mean the same thing: not because in one of them “listen” is stronger and in the other “hear” is stronger, nor because the terms are indistinguishable, but because their meaning is sufficiently malleable that it can be subordinated to the syntax. The Randolph quotation is mysterious because of how he uses “expedient,” especially given that he clearly recognizes its laxity in his second opinion on the Bank. See Opinion No. 2 of Edmund Randolph, Attorney Gen. of the U.S., (Feb. 12, 1791), in *Legislative and Documentary History of the Bank of the United States*, supra note

Finally, the notion that “proper” is the less restrictive term gains support from the drafting history of the Clause. The Committee of Detail took a draft of the Constitution that had the word “necessary,” and added the words “and proper.” The particular member of the committee who added those words was James Wilson, a stalwart supporter of national power.²⁴⁹ (It is a coincidence, perhaps, that he was also a sometime teacher of Latin.²⁵⁰)

Yet if the Clause were the Proper Clause (without “necessary and” in the text) it would still be puzzling. Whether legislation is proper looks like a quintessential legislative judgment. Congress should enact laws it thinks are proper; it should not enact laws it thinks are improper. To have courts inquire into the propriety of a law (again, by hypothesis “proper” is standing alone) looks like a question about whether a judge would have voted for the bill. Or, to vary the analogy, it looks like the discretionary veto of the President.

197, at 89, 90 (questioning whether there are any “who construe the words, ‘*necessary and proper*,’ so as to embrace every expedient power”). That leaves the quotation from Representative Barry, which supports part of Lawson and Granger’s thesis, namely that “proper” is a distinctive requirement. But Barry treats “proper” as part of means-end analysis, and he does not suggest that it is the more restrictive term. See *supra* notes 210 & 225 and accompanying text.

²⁴⁹ See Mikhail, *supra* note 183, at 1099. On Wilson’s life and thought, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901 (2008). Note that one member of the Convention drafted, but never made, a motion with alternative language that would have removed “and proper.” See Supplement to Max Farrand’s *The Records of the Federal Convention of 1787*, at 231 (James H. Hutson ed., 1987). I do not put much weight on arguments from unmade motions in Philadelphia, but the drafter of the motion was Pierce Butler of South Carolina, who may have wanted to narrow the incidental powers conferred by the Clause. Two hypotheses have been suggested for why he did not make the motion. The first is tactics: Making the motion might have disrupted bargains already struck, ones favorable to South Carolina. Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* 20 (1999). The second is learning: Perhaps “someone pointed out to Butler that the effect of the word ‘proper’ was to *confine* rather than expand the scope of congressional authority.” Natelson, *supra* note 190, at 91. The first is plausible; the second is not. If Butler decided he was wrong about the meaning of “and proper,” then surely he would have recognized that others could be wrong, too—and it would thus be dangerous to retain words that were susceptible to such misunderstanding. There is a coincidence too striking to omit: Twelve years after James Wilson added “and proper” to the Clause, when he was a Justice of the U.S. Supreme Court, he was imprisoned for debt. The creditor who had him imprisoned was Pierce Butler. See Ewald, *supra*, at 914–15.

²⁵⁰ Ewald, *supra* note 249, at 904.

Now the Clause gets more puzzling when the two terms are put together. If both terms can be placed along a spectrum of strictness,²⁵¹ not as points but as zones, then why use both terms? If each term is taken as an independent requirement—“necessary” being strict, and “proper” being lax—what is the point of including the weaker term? These are the problems with a straightforward reading of the Necessary and Proper Clause: “necessary” may be construed as too strict, “proper” may be construed as too lax, and the force of “proper” hardly matters at all because it is pointlessly duplicative. These problems can be mitigated, however, if the phrase is read as a hendiadys.

The starting point is the context in which the phrase appears. The Constitution grants to the national government certain defined and limited powers; all other powers are retained by the people and the states (a structural inference confirmed by the Tenth Amendment). In particular, Article I enumerates the powers of the national legislature. But as soon as there is an enumeration of powers, the question is how much Congress can do to carry out those powers. The Scylla and Charybdis are obvious: If Congress may do anything at all to carry out the enumerated powers, then the very scheme of a national government with defined and limited powers is overthrown; but if Congress may only do the exact things specified in Article I, without any flexibility as to means, then the national government would be almost as weak and restricted as the government operating under the Articles of Confederation. This is a classic Goldilocks problem.

Enter the word “necessary.” This is a relatively strict word, and by itself it would probably avoid the problem of unlimited means. But there are difficulties with “necessary”: its semantic range is broad, one end of that range is much too strict, and it is vague.

Now add the word “proper.” In the hendiadys, it modifies and moderates “necessary.” It serves as a rule of construction against taking “necessary” in its strict, Jeffersonian sense. It thus narrows the range of possible meaning for “necessary.” But it still leaves the standard vague.

If the phrase is read as a hendiadys, neither word stands alone. The choice of “necessary” suggests a close connection between the congressional action and the constitutionally specified end, while “proper”

²⁵¹ I borrow this way of putting the point from Geoffrey Miller, who gives a list of the various formulations in colonial and early republican corporate charters, and he suggests that they can be placed “on a scale of severity of restriction.” Miller, *supra* note 192, at 161.

counsels against an overly rigorous understanding of “necessary.” The phrase starts with a strict word, then leans in a latitudinous direction. What is required is not that the congressional action be “strictly necessary,” or that it be merely “proper,” but that it be “properly necessary.” Precisely because both words have such wide semantic ranges, and their extremes would be so destructive to the delicate balance of the constitutional system, those extremes need to be avoided. That is achieved, on paper, by joining the words in a hendiadys.

How, if at all, can this be squared with *McCulloch*? Chief Justice Marshall did not call the phrase a hendiadys. But there are several aspects of Chief Justice Marshall’s opinion that fit this reading better than the reading of the Clause as imposing two separate requirements.

One is the emphasis of Chief Justice Marshall’s opinion. He concentrated almost entirely on the meaning of “necessary.” He never applied “proper” as an independent requirement;²⁵² rather, he invoked it in only a single paragraph, and then only to use it as guidance for how to construe “necessary.”²⁵³ Indeed, he expressly said that including the word “proper” had the effect of “qualify[ing] that strict and rigorous meaning” that might otherwise be given to “necessary.”²⁵⁴ That was all that Marshall did with “proper.” But if the Clause contained two independent requirements—especially if “proper” were the more restrictive one—then Marshall could hardly have decided the case by holding that the Bank was “necessary” without also considering whether it was “proper.”²⁵⁵

Then there is the famous sentence in which Marshall summed up the meaning of the Necessary and Proper Clause:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.²⁵⁶

²⁵² Accord Thomas B. McAfee, *The Federal System As Bill of Rights: Original Understandings, Modern Misreadings*, 43 Vill. L. Rev. 17, 56 (1998).

²⁵³ *McCulloch*, 17 U.S. (4 Wheat.) at 418–19.

²⁵⁴ *Id.*; see also Story, *supra* note 27, § 1244, at 118–19; cf. A Virginian’s “Amphictyon” Essays, No. 2 (Apr. 2, 1819), *supra* note 239, at 66 (making the reverse argument, i.e., that “necessary” ruled out a lax reading of “proper”).

²⁵⁵ See *supra* note 246.

²⁵⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

This, too, is easier to fit with reading the Clause as a single unit of meaning. Unlike some of his later interpreters,²⁵⁷ Marshall does not associate some parts of this sentence with “necessary” and other parts with “proper.” He draws one line. It is a blurry jumbled sort of line. But it is one line for the Necessary and Proper Clause.²⁵⁸

In sum, *McCulloch* does not apply “necessary” and “proper” as separate requirements. It treats “proper” as excluding a strict reading of “necessary.” And it offers a famous summation of the legislation permitted by the Clause, a summation that draws a line falling between the possible extremes of “necessary” and “proper.” Each of these points is exactly what one would expect if the Clause were read as a hendiadys.²⁵⁹

Now the reading just given to the Necessary and Proper Clause is not conclusive. The relationship of the terms is ambiguous: The syntax al-

²⁵⁷ *United States v. Comstock*, 560 U.S. 126, 160–61 (2010) (Thomas, J., dissenting); Barnett, Necessary and Proper, *supra* note 194, at 772; Beck, *supra* note 199, at 644–45; Gardbaum, *supra* note 3, at 815–19; Somin, *supra* note 195, at 150–51; see also *United States v. Kebodeaux*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (finding a federal power to protect the public inconsistent “‘with the letter and spirit of the constitution,’ and thus not a ‘proper [means]’” (citations omitted)).

²⁵⁸ Similarly, when a Virginian critic argued that *McCulloch* gave too liberal a construction to congressional power, he offered a gloss that again drew a single line:

When a law is about to pass, the enquiry which ought to be made by Congress is, does the constitution expressly grant this power? if not, then, is this law one *without which* some power cannot be executed? If it is not, then it is a power reserved to the states, or to the people, and we may not use the means, nor pass the law.

A Virginian’s “Amphictyon” Essays, No. 2 (Apr. 2, 1819), *supra* note 239, at 70. But see John Marshall, A Friend to the Union, No. 2 (Apr. 28, 1819), *reprinted in* Marshall’s Defense, *supra* note 213, 91, 93–96 (critiquing Amphictyon’s gloss). Justice Story offered a similar gloss on what the Clause required, and though he used “necessary” and “proper” in separate clauses, he does not appear to be drawing a distinction between them (i.e., again a single line):

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be *expressed* in the constitution. If it be, the question is decided. If it be not *expressed*, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it.

Story, *supra* note 27, §§ 1232, 1238, at 110, 114.

²⁵⁹ A similar treatment of “necessary and proper” as a unitary phrase can be seen in two contemporaneous opinions of Attorney General Wirt that were not concerned with the Necessary and Proper Clause. See *Saline Springs in Illinois*, 1 Op. Att’y Gen. 420–22 (1820) (treating a statutory reference to any lands that the President “deemed necessary and proper for working the said salt springs” to be a reference to presidential discretion, and glossing the phrase with only the word “necessary” (emphasis omitted)); *Case of the Late Collector at Savannah*, 1 Op. Att’y Gen. 639 (1824) (answering in a unitary fashion the question “whether it be necessary and proper to bring a suit” against the late collector of Savannah).

lows these terms to be taken as separate requirements, as a tautology, as a term of art, or as a hendiadys.²⁶⁰ And no matter what relationship is posited, the terms themselves are still vague.²⁶¹ But exactly *how* the terms are vague depends on which reading is adopted. If the terms are read as independent requirements, then there are two vague requirements. If the terms are read as a hendiadys, then there is one vague requirement, and its vagueness is bounded by a rule of construction.

D. New Light on Three Puzzles

What has been established so far is that reading “necessary and proper” as a hendiadys is possible, and also that it fits certain aspects of the discussion in *McCulloch*. But there is something else to be said for taking the phrase as a hendiadys. Doing so helps to solve several puzzles about how the Clause was described and debated at the Founding.

First, an extraordinary number of early interpreters said that the Clause added no powers but only affirmed ones that would have been implicit in the rest of the Constitution. This view was expressed both before and after ratification, by both friends and foes of robust national power.²⁶² In Madison’s words before ratification, “Had the Constitution

²⁶⁰ Each possibility could be expressed less ambiguously: “both necessary and proper”; “necessary, that is, proper”; “‘necessary and proper’ in the technical sense”; and “necessary-and-proper.” All four of these more explicit formulations would, to varying degrees, be stylistically jarring in the Constitution, and at any rate it is no surprise that a semantic relationship can be expressed more and less explicitly.

²⁶¹ See Timothy A.O. Endicott, *Vagueness in Law* 54 (2000).

²⁶² See, e.g., The Federalist No. 33, supra note 24, at 204–05 (“[T]he constitutional operation of the intended government would be precisely the same, if these clauses [i.e., the Necessary and Proper Clause and the Supremacy Clause] were entirely obliterated, as if they were repeated in every article The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”); The Federalist No. 44, supra note 2; Wilson, supra note 221, at 468 (“It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution.”); James Madison, *Virginia Ratifying Convention*, in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, supra note 157, at 438–39 (“It is only a superfluity [I]t gives no supplementary power. It only enables them to execute the delegated powers.”); Madison, supra note 228, at 376 (“The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers.”); Hamilton, supra note 234, at 106 (“[I]t will not be contended . . . that the clause in question gives any *new* or *independent* power.”); St. George Tucker, *View of the Constitution of the United States*, in 1 *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Vir-*

been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication.”²⁶³

What is the background principle that is affirmed by the Necessary and Proper Clause? It is a principle of implied powers, and more specifically—since “implied powers” is now easily misunderstood—it is the principle that the grant of a general power includes the grant of incidental powers for carrying it out.²⁶⁴ That is, that when powers are grant-

ginia 140, 287 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (“It neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant.”); A Virginian’s “Amphictyon” Essays, No. 2 (Apr. 2, 1819), *supra* note 239, at 69–70; Marshall, *supra* note 258, at 96–97 (referring to the famous passage in *McCulloch*—“Let the end be legitimate . . .”—as a “rule of construction,” and adding: “I think, as the Supreme Court has thought, that it would be the proper rule, were the grant which has been the subject of so much discussion [i.e., the Necessary and Proper Clause], expunged from the constitution.”); Story, *supra* note 27, §§ 1232, 1238, at 110, 113–14 (“It neither enlarges any power specifically granted; nor is it a grant of any new power to congress. But it is merely a declaration for the removal of all uncertainty . . .”). But see Rep. Gerry (House of Representatives, Feb. 7, 1791) in *Legislative and Documentary History of the Bank of the United States*, *supra* note 197, at 75, 78. *McCulloch* is sometimes read to the contrary, but Marshall argued otherwise: “The court [in *McCulloch*] then has not contended that this grant enlarges, but that it does not restrain the powers of Congress; and I believe every man who reads the opinion will admit that the demonstration of this proposition is complete.” Marshall, *supra* note 258, at 97. For additional sources to the same effect, see Barnett, *The Original Meaning of the Necessary and Proper Clause*, *supra* note 194, at 185–87; Beck, *supra* note 199, at 592 n.58; Natelson, *supra* note 203, at 296–314; see also Akhil Reed Amar, Seegers Lecture in Jurisprudence at the Valparaiso University School of Law (Oct. 26, 1998), in *Constitutional Redundancies and Clarifying Clauses*, 33 Val. U. L. Rev. 1, 7–10 (1998) (noting that although *McCulloch* says the Necessary and Proper Clause does not restrict national power, the opinion does not say that the Clause augments national power, and concluding that it “might well be a declaratory or clarifying provision designed to remove all doubts”). This view accords with Professor Jack Rakove’s description of the debate over the Necessary and Proper Clause: “the lack of controversy over this clause suggests that [the framers] did not regard it as augmenting the powers already vested in the national government.” Rakove, *supra* note 228, at 180.

²⁶³ The Federalist No. 44, *supra* note 2, at 304. On background principles and the Constitution, see Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1 (2015); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813 (2012).

²⁶⁴ The Founders used “incidental powers” and “implied powers” interchangeably: there were implied powers, and they were the incidental powers. In present usage, however, “implied powers” often refers to something quite different, e.g. Mikhail, *supra* note 183, and so this Article uses “incidental powers.” On the relationship between “incidental powers” and “means,” see *infra* note 325.

ed, “the means of carrying [those powers] into execution . . . are included in the grant.”²⁶⁵ Many examples were given of powers that were or were not incidental to other powers.²⁶⁶ Although there was substantial agreement that there was a meaningful principle of incidental powers, it was also a principle that was hard to formulate with specificity. It was a principle found in the common law and the law of nations,²⁶⁷ and also in legal instruments that established an agency relationship.²⁶⁸

²⁶⁵ Tucker, *supra* note 262, at 287–88 (describing the Clause as “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted, are included in the grant”). The language from St. George Tucker also appears in Story, *supra* note 27, § 1238, at 113–14. Randolph also saw the Necessary and Proper Clause as affirming incidental powers, but he attributed this to the word “necessary.” Randolph, *supra* note 197, at 89 (“To be necessary is to be incidental, or in other words, may be denominated the natural means of executing a power.”). See also Marshall, *supra* note 258, at 101 (expressly equating the famous standard of *McCulloch*—“Let the end be legitimate . . .”—with the principle of incidental powers); Letter from William Johnson, to James Monroe (June 1822), in Jefferson Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* 324, 324–25 (1991) (“The principle assumed in the case of the Bank is that the grant of the principal power carries with it the grant of all adequate and appropriate means of executing it”).

²⁶⁶ See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 416–17; The Federalist No. 33, *supra* note 24, at 206; Hamilton, *supra* note 234; Jefferson, *supra* note 19, at 279; Madison, *supra* note 228, at 377; Letter from James Madison, to Spencer Roane (Sept. 2, 1819), in 8 The Writings of James Madison, 1808–1819, at 447, 449–50 (Gaillard Hunt ed., 1908); Marshall, *supra* note 258, at 94–100, 102; Roane’s “Hampden” Essays, No. 2 (June 15, 1819), *supra* note 213, at 118–21; Roane’s “Hampden” Essays, No. 3 (June 18, 1819), *supra* note 213, at 134; Tucker, *supra* note 262, at 287–89; A Virginian’s “Amphictyon” Essays, No. 2 (Apr. 2, 1819), *supra* note 239, at 66–70; Story, *supra* note 27, § 1253, at 126 n.1; see also Natelson, *supra* note 204, at 60–68 (giving examples of principals and incidents from English law).

²⁶⁷ For an example from the common law, see *infra* text accompanying note 325.

²⁶⁸ There is a growing literature that associates the Necessary and Proper Clause with the law of agency and fiduciary relationships, along with doubts about how robust the implications are. See, e.g., Lawson et al., *supra* note 18; Barnett, *The Original Meaning of the Necessary and Proper Clause*, *supra* note 194, at 217–18; Harrison, *supra* note 18; Manning, *supra* note 18; Natelson, *supra* note 203; Valauri, *supra* note 33, at 819–20; cf. Manning, *supra* note 3 (analogizing the Clause not so much to agency as to agencies). The authors of the leading work on the subject, Lawson et al., *supra* note 18, often use a two-step analysis, starting with a specific context in which incidental powers were important (e.g., corporate charters, equitable doctrines for trustees) and then moving directly to the Necessary and Proper Clause. I find a three-step analysis more plausible, starting with specific contexts, moving to a more general and less-defined principle of incidental powers, and then moving to the Necessary and Proper Clause. See Harrison, *supra* note 18, at 1116–18, 1131; Manning, *supra* note 18, at 1369–74; see also Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145, 1176–77 (2014) (criticizing an emphasis on trust law as the background for the Necessary and Proper Clause); Eric Lomazoff, *Speak (Again), Memory: Rethinking the Scope of Congressional Power in the Early American Republic*, 47

Consider how Madison, in a single speech on the Bank bill in the House of Representatives, glossed the meaning of the principle in five different ways. Included, Madison said, in the grant of an express power are (1) “means *necessary* to the *end*, and *incident* to the *nature* of the specified powers”; (2) “what would have resulted by unavoidable implication, as the appropriate, and as it were, technical means of executing those powers”; (3) “direct and incidental means”; (4) “[whatever is] evidently and necessarily involved in an express power”; and (5) “an accessory or subaltern power, to be deduced by implication, as a means of executing another power.”²⁶⁹ These are not descriptions of five different things, but five descriptions of the same thing: the incidental powers for carrying out an express power are included with it. This principle is what Hamilton called “*the great and essential truth* which it is manifestly the object of that provision to declare.”²⁷⁰

If the Necessary and Proper Clause is an affirmation of what would otherwise be an implicit grant of authority, then which reading of the text is better? The incidental-powers principle does not have the crisp, two-part logic suggested by *Printz* and *NFIB*.²⁷¹ It does not have two requirements. Rather, it is fuzzy, indeterminate, and unitary—just like the hendiadic reading is fuzzy, indeterminate, and unitary. Recall George Wright’s warning about hendiadys in *Hamlet*: “Because phrases involving hendiadys are not often understood as such, their meanings are jumbled, *reduced to a stricter logic than the verbal situation can justify*, or even entirely misread.”²⁷² Here, too, an interpretation that makes each word a separate, independent requirement imposes “a stricter logic” on the incidental-powers principle than it can bear.

Tulsa L. Rev. 87, 89 (2011) (praising the materials on the background of the Clause produced by Lawson, Miller, Natelson, and Seidman, while also noting that their chapters can be considered “competing hypotheses”). What results is less determinate, but more congruent with how the principle of incidental powers was invoked during the ratification and Bank debates.

²⁶⁹ Madison, *supra* note 228, at 376, 378–79. In his speech presenting what became the Bill of Rights, Madison also described the Clause as giving Congress “certain discretionary powers with respect to the means,” so that it may “fulfil every purpose for which the government was established.” Madison, *supra* note 217, at 205.

²⁷⁰ The Federalist No. 33, *supra* note 24, at 206 (emphasis added).

²⁷¹ *NFIB* does not speak with one voice here. Although the decision holds to a two-requirements view of the Clause, it also states that the Clause is only an affirmation that Congress has the powers incidental to its enumerated powers. 132 S. Ct. at 2591.

²⁷² Wright, *supra* note 8, at 181 (emphasis added).

Second, the dominant rhetorical move in debates about the Necessary and Proper Clause, on both sides, was the *reductio ad absurdum*. Martin Luther once said that human nature is like a drunk peasant riding a horse, always falling off one side or the other.²⁷³ That is the impression one receives about the prospects of the national government from the early debates over the Necessary and Proper Clause. We are told that a loose construction of the Clause might lead to a national government that is so powerful that every counterweight shrivels into nothing,²⁷⁴ and that a rigorous construction will lead to a national government that itself shrivels into nothing.²⁷⁵ Leviathan or Lilliputian, with nothing in between. Whatever their merits, both arguments assume that the Necessary and Proper Clause could easily be a slippery slope.²⁷⁶ The problem both

²⁷³ See William Hazlitt, Table Talk; or, Original Essays 351 (London, John Warren 1821) (“Or as Luther complained long ago, ‘human reason is like a drunken man on horse-back: set it up on one side, and it tumbles over on the other.’”).

²⁷⁴ For Anti-Federalist examples, see Brutus, No. 1, in 2 The Complete Anti-Federalist 363, 367–68 (Herbert J. Storing ed., 1981); Centinel, No. 5, in 2 The Complete Anti-Federalist, supra, at 166, 168–69; An Old Whig, No. 2, in 3 The Complete Anti-Federalist, supra, at 22, 24–26. For examples from Jefferson and Madison, see Jefferson, supra note 19, at 278 (describing a broad construction as one that “would swallow up all the delegated powers, and reduce the whole to one phrase”); Madison, supra note 228, at 376, 378 (“If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”); Madison, supra note 266, at 448 (criticizing *McCulloch* for setting aside the Clause’s “definite connection between means and ends” and substituting “a Legislative discretion as to the former to which no practical limit can be assigned”). For other examples, see Randolph, supra note 197, at 89 (“[L]et it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction, which they arrogate will not terminate in an unlimited power in Congress.”); John Taylor, Construction Construed and Constitutions Vindicated 170 (Richmond, Shepherd & Pollard 1820); A Virginian’s “Amphictyon” Essays, No. 2 (Apr. 2, 1819), supra note 239, at 73–75.

²⁷⁵ Hamilton, supra note 234, at 103 (criticizing a narrow construction of “necessary,” because “[t]here are few measures of any government, which would stand so severe a test”); *McCulloch*, 17 U.S. (4 Wheat.) at 416–18; cf. The Federalist No. 33, supra note 24, at 205–06 (explaining the existence of the Clause on the grounds that it would ward off “the danger which most threatens our political welfare”: “that the State Governments will finally sap the foundations of the Union”).

²⁷⁶ Madison and Hamilton seem to have recognized the double *reductio*. Madison, though rejecting a latitudinarian interpretation, noted that “very few acts of the legislature could be proved essentially necessary to the absolute existence of government.” 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 417 (Jonathan Elliot ed., Washington, 2d ed. 1836). Hamilton, though rejecting a cramped interpretation, recognized that “[t]he moment the literal meaning is departed from, there is a chance of error and abuse.” Hamilton, supra note 234, at 106.

sides confront is about degree. No one was concerned about structure, about the interaction between the elements of “necessary and proper.” If the Clause should be read as having two independent requirements, then there would need to be discussion of its structure. But if not, if the Clause imposes a single vague requirement, then it is easy to see why the rhetoric would be so dominated by slippery slopes. This sense is further confirmed by Madison’s double-slippery-slope description of the analogous Clause of the Articles of Confederation, which put the legislature to “the alternative of construing the term ‘*expressly*’ with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.”²⁷⁷ It is not a quirk in the wording of the Necessary and Proper Clause that makes it the location of so many slippery-slope arguments, but rather the difficulty of definition that is inherent in questions about incidental powers.

A third puzzle is the trope of impossible drafting. Both Madison and Story push back on critics by saying, in effect, “You suggest a better way to draft it.”²⁷⁸ Implicit in this rejoinder is the idea that whatever the Clause does is difficult to put into words. It is a little elusive.

Now these three puzzles can be seen together. It is clear that from the beginning the Necessary and Proper Clause has been interpreted in many different ways. It is therefore fruitless to seek any sharply defined, uniformly accepted meaning for the Clause. But some readings can still be stronger than others. The two-requirements reading and the hendiadic reading both fail to receive explicit endorsement in the canonical interpretations of the Necessary and Proper Clause. But one of these readings better fits the uncertainties, confusions, and points of conflict in the ratification and postratification literature. If the Clause had two requirements, we would expect to see debate about their interaction, about the cases that might meet one requirement but fail the other one, and about the mechanics of this machine with two moving parts. But instead we see the confusion that would come from an affirmation of a vague background principle, a single hard-to-define line that would be in constant

²⁷⁷ The Federalist No. 44, *supra* note 2, at 303.

²⁷⁸ See *id.*; Story, *supra* note 27, §§ 1232–36, at 110–13; see also Madison, *supra* note 262, at 438–39 (arguing that the Necessary and Proper Clause is stated in general terms because “to delineate on paper all those particular cases and circumstances in which legislation by the general legislature would be necessary . . . is not within the limits of human capacity”).

danger of being pulled to one extreme or the other. Taking the phrase as a hendiadys means it is unclear in all the right places.

E. How Many Things Is It Proper for “Proper” To Do?

In the reading given above, “necessary” suggests a close connection between the incidental power and the enumerated power (i.e., between the congressionally chosen means and the constitutionally specified end). And “proper” works as a rule of construction against an overly rigorous interpretation of “necessary.” Given the complex interaction that is possible between the terms in a hendiadys,²⁷⁹ it is at least open to argument that “proper” has another duty, serving as a reminder that an incidental power must belong to an enumerated one.²⁸⁰

The place to begin is with Lawson and Granger’s argument. Recall that when they argue for “necessary” and “proper” as two separate requirements, they give “proper” what they call a jurisdictional meaning.²⁸¹ That is, congressional action under the Clause must be within the jurisdiction of Congress, which means it must comply with other constitutional provisions and principles, including federalism, the separation of powers, and unenumerated rights.²⁸² It is that ultimate conclusion which has been invoked by the Court in *Printz*, *Alden*, and *NFIB*.

As support for this, Lawson and Granger appeal to one of the meanings of “proper” in Dr. Johnson’s *Dictionary*: “1. Peculiar; not belonging to more; not common.”²⁸³ This shade of meaning is rather technical, and it continues today mostly in theological and philosophical writing. The idea is that some characteristic or action is “proper to” an entity of some sort, in the sense that it belongs to, and in some cases belongs only to,

²⁷⁹ See supra Part I, especially notes 105–14 and accompanying text.

²⁸⁰ For a prior suggestion that “proper” may have multiple functions, see McAfee, supra note 252, at 70–71 & n.207. The sense of “proper” discussed here is anticipated in Beck, supra note 199, at 641–48. Because Beck does not see the phrase as a hendiadys, he draws sharper distinctions between “necessary” or “proper,” and he also takes some sources to be using “proper” in a technical sense when they may only be using the word as a shorthand for the entire phrase (e.g., *The Federalist* No. 33, supra note 24).

²⁸¹ Lawson & Granger, supra note 6, at 291–98; see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2105 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (“[T]he best interpretation of ‘proper’ is that a law must fall within the peculiar jurisdiction of Congress.”).

²⁸² Lawson & Granger, supra note 6, at 271–72.

²⁸³ *Id.* at 291; see also *Zivotofsky*, 135 S. Ct. at 2105 (Thomas, J., concurring in the judgment in part and dissenting in part) (endorsing this definition).

that entity (e.g., for Heidegger, “to philosophize is proper to the human species”²⁸⁴). Lawson and Granger are certainly on good ground to say that “proper” can bear this sense. They give this sense a decidedly legal gloss by calling it “jurisdictional,” but a better word might be “proprietary.” We might say that the Clause authorizes carrying-into-execution powers that are “necessary and proprietary.”

At this point, Lawson and Granger make two mistakes. First, they confuse sense and reference. They adduce many passages where “proper” is used and the *referent* is jurisdiction, but where the *sense* of the word is not “jurisdictional” (to use their term).²⁸⁵ Second, they overlook one of the implications of using “proper” in this sense: It would not mean that Congress could act only in ways permitted by the Constitution, but rather that Congress could act only in ways unique to Congress. The fact that something could be done by the executive or the judiciary would mean that it was not “proper” to Congress.²⁸⁶

Given these mistakes, one might think that this proprietary sense of “proper” has nothing to add to the interpretation of the Necessary and Proper Clause. But that would be too quick. There is an important, but tacit, assumption in Lawson and Granger’s analysis. They assume that the incidental power must be proper to *Congress*. And that is an unsurprising answer if we put the question this way: To *whom* must this power be proper? But consider a question that is slightly but tellingly differ-

²⁸⁴ Marc Froment-Meurice, *That Is to Say: Heidegger’s Poetics* 24 (Werner Hamacher & David E. Wellbery eds., Jan Plug trans., 1998) (“Even Heidegger (at least the ‘early’ Heidegger) subscribes to the credo, repeated from Plato to Kant and beyond, that to philosophize is proper to the human species, is what signs the human as such, and is inscribed for all time as its ‘nature.’”). For a theological example, see Thomas Aquinas, *Summa Theologica*, pt. III, question 7, art. 10 (Fathers of the English Dominican Province trans., 1913).

²⁸⁵ See the examples in Lawson & Granger, *supra* note 6, at 291–97. Some of their examples can be read either way, but in some “proper” is clearly better read as “fitting” than as “within the jurisdiction of.” One of the latter is the statement in the Vermont Constitution of 1786 that “[c]ourts of justice shall be maintained in every county in this State, and also in new counties when formed; which courts shall be open for the trial of all causes *proper* for their cognizance.” *Id.* at 292 (alteration and emphasis in Lawson & Granger). Jurisdiction is being referred to and set up by this provision of the state constitution, but that is the force of the entire sentence, not of the word “proper.”

²⁸⁶ Lawson and Granger might have slipped this band if they had relied not on Dr. Johnson’s first sense for “proper” but on his third: “3. One’s own.” 2 Johnson, *supra* note 69 (“PRÓPER”). This sense strikes a note of “belonging to” rather than “belonging only to.”

ent: To *what* must this power be proper? An answer suggests itself at once: The incidental power must be proper to the enumerated power.²⁸⁷

This question—whether the power to incorporate a bank is an incident of any of the Article I enumerated powers—is exactly the ground on which the House of Representatives debated the constitutionality of the First Bank of the United States.²⁸⁸ Moreover, this way of thinking about the Clause has explicit support in Chief Justice Marshall’s defense of *McCulloch*.²⁸⁹ He says that the means must “belong peculiarly” to the enumerated end.²⁹⁰ Intriguingly, he attributes this idea not to the word “proper” itself but rather to the entire Clause:

That court has said: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,” “are constitutional.” The word “appropriate,” if Johnson be authority, means “peculiar,” “consigned to some particular use or person,”—“belonging peculiarly.”

Let the constructive words used by the supreme court, in this their acknowledged sense, be applied to any of the powers of Congress. Take for example, that of raising armies. The court has said that “all means which are appropriate,” that is, “all means which are peculiar” to raising armies, which are “consigned to that particular use,” which “belong peculiarly” to it, all means which are “plainly adapted” to the end, are constitutional.²⁹¹

What Marshall does here is fascinating. He embraces the proprietary sense of “proper” that Lawson and Granger point to,²⁹² but he reads this not as a link between the incidental power and what Congress may permissibly do, but as a link between the incidental power and the enumerated power it is executing. The incidental power must be proper to the enumerated power. Marshall does not, however, rely on the word “proper” for this concept, but rather on the whole idea of means-end fit. In-

²⁸⁷ This point is made in Beck, *supra* note 199, at 641.

²⁸⁸ See *supra* note 231.

²⁸⁹ It also has explicit support in Justice Roane’s criticism of *McCulloch*. See Roane’s “Hampden” Essays, No. 3 (June 18, 1819), *supra* note 213, at 133. For more discussion of this passage in the third Hampden essay, see *supra* notes 213–16 and accompanying text.

²⁹⁰ Marshall, *supra* note 258, at 102.

²⁹¹ *Id.* at 101–02.

²⁹² Lawson and Granger cite Marshall’s essay, but not this passage.

deed, the word he is defining from Dr. Johnson's *Dictionary* is not even "proper" at all, but "appropriate."²⁹³

One logical and practical objection must immediately be faced. Certain actions might well be useful means of carrying out multiple enumerated powers. How could such an action be proper to—belong *only* to—one enumerated power? For example, if Congress were to set up a special court to hear cases involving vessels seized from pirates, that might be well calculated to execute at least three enumerated powers:

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.²⁹⁴

But one need not understand the proprietary sense of "proper" quite so restrictively. When used in a proprietary sense, the word "proper" can mean "belonging only to" or simply "belonging to."²⁹⁵ What Marshall has in mind is a close connection between the incidental power and the enumerated power, not a unique connection. He shows this when he equates "belong peculiarly" with a means-end fit that is close, but not so close that it excludes all congressional choice.²⁹⁶

²⁹³ On "proper" in Dr. Johnson's *Dictionary*, see *supra* note 286 and text accompanying note 283.

²⁹⁴ U.S. Const. art. I, § 8, cls. 9–11.

²⁹⁵ See *supra* note 286.

²⁹⁶ Marshall finds no distinction between (1) "means which directly and necessarily tend to produce the desired effect" and (2) "means which 'belong peculiarly' to the production of that effect," but finds a sharp distinction between both of these formulations, and (3) "means . . . *without which* the effect *cannot* be produced." Marshall, *supra* note 258, at 102. The argument that Marshall is rejecting is that the Clause permits Congress to "employ no means but those *without which* the end *could not* be obtained." *Id.* at 92–102. Despite Marshall's criticism, this view has not disappeared. Later Justices have sometimes pointed to possible alternatives when assessing whether a challenged statute was truly "necessary and proper." See, e.g., *NFIB*, 132 S. Ct. at 2647 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved."); *Trop v. Dulles*, 356 U.S. 86, 114 (1958) (Brennan, J., concurring in judgment) (pointing to "alternative methods" as reason to conclude that "the statute is not 'really calculated to effect any of the objects entrusted to the government'" and thus "falls beyond the domain of Congress") (quoting *McCulloch*, 17 U.S. (4 Wheat.) 316).

In the end, the propriety sense of “proper” that Lawson and Granger pointed to does have something to say about the Clause. It does not make “proper” into a separate requirement for congressional action, but it does once again direct our attention to the importance of the fit between the enumerated power and the incidental power.

When this Article suggests that “necessary and proper” is a hendiadys, the core claim is that these terms work together to make explicit that Congress has incidental powers to “carry into execution” the powers given by the Constitution. There must be a close relationship, not one of *Palsgrafian* remoteness, between the congressionally chosen means and the constitutionally specified end (hence “necessary”), but the relationship required is not one of Jeffersonian strictness (hence “proper”). This is vague, but inevitably so.

What the proprietary sense of “proper” does is reinforce the need to read the two terms together. Like the Cruel and Unusual Punishments Clause, the Necessary and Proper Clause is more than a sequence of separate elements. What it affirms is not that Congress has the power to enact legislation that both happens to be needed and happens to be proper to an enumerated power.²⁹⁷ Rather, the Clause affirms that Congress has the incidental powers that are proper to each of its enumerated powers precisely because they are the powers ordinarily needed to carry those enumerated powers into execution.

Now one could go further, and draw on other shades of meaning for “proper.” Within a hendiadys, this kind of multiplicity of meaning is familiar. But it is a constitution we are interpreting, not a sonnet. Cases must be decided, and so one cannot indulge an infinite freedom of creative readings with no end to the *différance*. Even so, the shade of “proper” just discussed—the proprietary sense—is pervasive in the early interpretations of the Clause. It again suggests that the Necessary and Proper Clause is not easily reduced to two requirements. The fact that those who made this point often did so not under the banner of “proper” but under the banner of “necessary and proper,” is another reminder not to sunder the Clause.

²⁹⁷ For a parallel point about “cruel and unusual,” see *supra* note 149 and accompanying text.

F. Implications for Judicial Enforcement

The reading of the Necessary and Proper Clause given here does not compel a view of who decides its meaning and application. But this reading does point towards some views and away from others. In particular, understanding “necessary and proper” as a hendiadys points away from two views. The first is what might be called the bifurcated-deference view, i.e., the view, reflected in *NFIB* and some recent scholarship, that courts should be more deferential about what is “necessary” but less deferential about what is “proper.” The second is John Manning’s view that the Clause is an “empty” delegation, and thus an area in which courts should give a high degree of deference to congressional judgments.

The starting point is recalling that incidental powers cannot be fully spelled out in advance.²⁹⁸ Nor is it possible to specify in advance exactly what the right degree of means-end fit is—that is the reason for the hendiadys in the first place. Remember Madison’s argument: you draft it better.²⁹⁹ Inevitably, then, the judgment in the first instance will belong to Congress. That is, Congress will decide whether a statute is necessary and proper to an enumerated power.³⁰⁰ As a practical matter, there is likely to be deference from the courts when assessing the decision Congress made, for three reasons.

First, means-end fit may involve policy questions that are matters for legislative judgment. This point, however, can be easily overstated. The principle of incidental powers that is affirmed in the Necessary and Proper Clause should not be treated as merely a question of policy. Indeed, those who wanted a broader interpretation of the Clause, such as Hamilton, and those who wanted a narrower interpretation, such as St. George Tucker, agreed that the scope of the power affirmed by the Clause was an analytical question suited to judicial resolution, not a pol-

²⁹⁸ The Federalist No. 44, *supra* note 2, at 304; Madison, *supra* note 262, at 438–39; Marshall, *supra* note 258, at 103. Iredell made similar arguments against the idea of specifying punishments that were forbidden to Congress. See Iredell, *supra* note 161.

²⁹⁹ See *supra* note 278 and accompanying text.

³⁰⁰ See 1 Annals of Cong. 431, 438 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (“for it is for them [i.e., Congress] to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation”). The care that Congress shows in making that constitutional judgment has not been constant. Compare Currie, *supra* note 162, with Keith E. Whittington, James Madison Has Left the Building, 72 U. Chi. L. Rev. 1137, 1155–58 (2005) (reviewing J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (2004)).

icy question that was a matter of legislative competence.³⁰¹ Indeed, Hamilton laid great stress on this point:

The *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency. The *relation* between the *measure* and the *end*, between the *nature* of the *mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of *necessity* or *utility*.³⁰²

A similar point seems to be made in *McCulloch* itself. Chief Justice Marshall observed that the Court will not “inquire into the degree of [a statute’s] necessity.”³⁰³ That observation is usually taken to be a statement of great deference to Congress. But given the similarity to Hamilton’s statement, and Marshall’s evident familiarity with Hamilton’s opinion on the Bank and his reliance upon it in *McCulloch*,³⁰⁴ Marshall

³⁰¹ Hamilton, *supra* note 234, at 104; see Tucker, *supra* note 262, at 288–89 (distinguishing the question whether “the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution,” from “questions of mere policy, and expediency”); cf. Story, *supra* note 27, § 1241, at 117 (arguing that Congress’s incidental powers do not depend on circumstances that vary over time).

³⁰² Hamilton, *supra* note 234, at 104. For echoes of this point in later literature, see Epstein, *supra* note 167, at 215 (“As a legal matter, the question of constitutional power to establish a national bank must be resolved independent of any view of the success of the bank in its commercial operations, which in this instance were substantial.”); Barnett, *The Original Meaning of the Necessary and Proper Clause*, *supra* note 194, at 208 (“[I]f one adopts the view of Jefferson and Madison that ‘necessary’ means that a given law must be incidental and closely connected to an enumerated power, then this is a matter of constitutional *principle* and within the purview of the Courts to assess.”); Garbbaum, *supra* note 3, at 820–22; Stephen E. Sachs, *The Uneasy Case for the Affordable Care Act*, 75 L. & Contemp. Probs. 17, 23–25 (2012) (“To the extent that current doctrine still requires implicit powers to be ‘plainly adapted’ or ‘incidental’ to those granted in the Constitution, Congress can’t do *everything* necessary to keep its choices from proving unwise.”). There is some tension between the idea that incidental powers are not a matter of policy and the idea that the Necessary and Proper Clause was meant to adapt to changing circumstances. See *infra* note 313 and accompanying text.

³⁰³ *McCulloch*, 17 U.S. (4 Wheat.) at 423.

³⁰⁴ See 8 *The Papers of John Marshall: Correspondence, Papers, and Selected Judicial Opinions*, March 1814–December 1819, at 257 (Charles F. Hobson, ed., Laura S. Gwilliam, ed. assoc., 1995).

may instead have been reiterating Hamilton's point that policy is not the criterion under the Necessary and Proper Clause.³⁰⁵

Second, Congress and the courts operate at different times when deciding that a law is beyond the scope of the incidental powers affirmed by the Clause. Congress decides before a bill is passed, and less harm is done if members of Congress refrain from enacting a statute because they have constitutional doubts. Courts decide after the bill is passed, and usually after the law has gone into effect. The disruption from a judicial decision that the law is unsupported by the Constitution may be severe, though it would obviously vary from case to case.

Third, striking down a law as not "necessary and proper" for carrying into effect an enumerated power raises distinctive questions of severability when the provisions are interlocking: Taking out this provision as not "necessary and proper" might lead to another one falling for the same reason, and another, and another. These three problems—policy judgments, disruption costs, and severability domino effects—mean that on purely practical grounds there is likely to be some deference to legislative judgments under the Clause.

The question is whether there should be deference beyond these practical considerations. Here the two-requirements reading of the Clause has a clever answer: Whether the statute is "necessary" is a quintessential policy judgment for which the legislature is best suited (hence great deference), but whether the statute is "proper" depends on reading the text and structural principles of the Constitution and that is an inquiry for which the courts are best suited (hence little deference).³⁰⁶ If the two-requirements reading were right, this would be at least a plausible approach to judicial enforceability. It would offer some deference and some review, not randomly, but with a division of labor. One weakness would be the inchoate standards for what counts as "proper";³⁰⁷ another would be the denigration of Congress's ability and duty to make judgments about the Constitution. But if the two-requirements reading is

³⁰⁵ Accord *The Legal Tender Cases*, 110 U.S. 421, 450 (1884); see also *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505–08 (2013) (Roberts, C.J., concurring in the judgment) (declining to join the majority opinion because its policy arguments in favor of the challenged statute were not relevant for deciding whether the statute was supported by the Necessary and Proper Clause).

³⁰⁶ Stephen Gardbaum has also argued for different levels of deference on the two inquiries, Gardbaum, *supra* note 3, at 817, though he warns against making the review of means-end fit too perfunctory, *id.* at 819–22.

³⁰⁷ See Beck, *supra* note 199, at 640; Manning, *supra* note 3, at 55–57.

wrong, then there is no support at all for this bifurcated deference. There would be only one requirement under the Necessary and Proper Clause, and the question would be whether that one requirement should be given any enforcement beyond the “political safeguards of federalism”³⁰⁸ and of the separation of powers.

In a recent Foreword for the *Harvard Law Review*, John Manning says no, mostly.³⁰⁹ He argues that the Clause embodies a broad delegation, a kind of “empty standard” that must be filled in by someone. That someone, Manning argues, is Congress and thus the courts should defer to any reasonable determination made by Congress that a statute is “necessary and proper” for carrying into execution an enumerated power. It is a Thayerian position for the Necessary and Proper Clause.³¹⁰

Yet Manning’s argument is weakened by thinking of the Clause as a hendiadys. If the Clause is read this way, it turns out not to be as “empty” as he suggests. It is vague, but that is not the same thing. As “necessary” is qualified by “proper,” an extreme interpretation is ruled out and the indeterminacy is lessened. The background principle of incidental powers is fuzzy but not content-free.³¹¹ What Manning has ably critiqued is the effort to give “proper” force as an independent requirement.³¹² But once “proper” is no longer taken to be an independent requirement, his argument for Thayerian deference is eroded.

³⁰⁸ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

³⁰⁹ Manning, *supra* note 3.

³¹⁰ James Bradley Thayer, and especially his argument for highly deferential judicial review, are discussed in *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1 (1993).

³¹¹ Accord Sachs, *supra* note 263, at 1861–63. For starting points on the content of the incidental-powers principle, see Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson et al., *supra* note 18, at 52; Harrison, *supra* note 18; Manning, *supra* note 18; see also *supra* notes 264–68 and accompanying text. In addition, Manning’s argument for deference depends on the premise that the Clause is a delegation of lawmaking power. Manning, *supra* note 18, at 50 (“Bedrock principles of administrative law teach us that deference, at least in the strong sense, depends on both the existence and the recipient of a delegation.”). For the vertical aspect of the Clause, however, it is not obvious that “delegation” is apt here. If the Clause affirms that Congress has incidental powers to execute the enumerated powers—powers that Congress would have even if the Clause did not exist—then it is hard to get much mileage out of the Clause being a delegation, and the analogues from administrative law are less apt. As to the horizontal aspect of the Clause, however, Manning’s delegation premise would seem to hold.

³¹² For scholarly views about what content “proper” has as an independent requirement, see *supra* notes 188–96 and accompanying text.

The reading of the Clause given here does support the arguments by Manning and others that the content of the Clause is meant to be filled in over time (or “liquidated,” to use a Madisonian term).³¹³ As Professor John Harrison has aptly said, the Necessary and Proper Clause

is the sort of thing that drafters use when their confidence in their own foresight is substantial but not complete, or, more specifically, when they think they have sorted out the big issues to their own satisfaction and want to make sure that strict construction does not interfere with sorting out the details later.³¹⁴

And recall Madison’s words about the impossibility of specifying all the incidental powers that would be necessary.³¹⁵ In other words, *ex ante* specification is impossible and so *ex post* specification is needed.

This problem of retreating to *ex post* specification is a familiar one in many areas of law, from the equitable interpretation of statutes³¹⁶ to agency law and fiduciary law.³¹⁷ In many of these contexts there is some deference given to the decision maker (e.g., a trustee), but that deference is not quasi-absolute. Thus the need for *ex post* specification does not provide a reason for Congress to do all the *ex post* specifying.³¹⁸

Indeed, that conclusion is buttressed by the fact that other clauses in the Constitution make a government actor the sole judge of a matter: e.g., the President’s duty under the Recommendations Clause to recommend to Congress “such Measures as he shall judge necessary and expe-

³¹³ Manning, *supra* note 18, at 10–11; see also Madison, *supra* note 266, at 450–51 (noting that it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them”).

³¹⁴ Harrison, *supra* note 18, at 1124; see also Nelson, *supra* note 127, at 544; cf. The Federalist No. 44, *supra* note 2, at 304 (rejecting the possibility that the Constitutional Convention might have “attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect,” in part because it would have to be “accommodated . . . to all the possible changes which futurity may produce”); *McCulloch*, 17 U.S. (4 Wheat.) at 415.

³¹⁵ See *supra* note 27 and accompanying text.

³¹⁶ See McConnell, *supra* note 189.

³¹⁷ Henry E. Smith, Why Fiduciary Law Is Equitable, in *Philosophical Foundations of Fiduciary Law* 261 (Andrew S. Gold & Paul B. Miller eds., 2014).

³¹⁸ See William Baude, Sharing the Necessary and Proper Clause, 128 Harv. L. Rev. F. 39, 45 (2014) (“To be sure, those who exercise power will usually take the first cut at interpreting their own authority, but that tells us nothing about who gets the final say.”).

dient.”³¹⁹ But the Necessary and Proper Clause does not. And Madison and Marshall expressly argued that the executive and the judiciary would need to push back if Congress were to exceed its powers under this Clause.³²⁰ Nor should Marshall’s point be seen as merely tactical. The early nationalist position was that the judiciary had a duty “to review” whether the acts of Congress had “an appropriate connection” to its constitutionally defined powers.³²¹

Thus, if the Necessary and Proper Clause is read as a hendiadys, it casts doubt on some widely held views about the nature and degree of deference the courts show to Congress. A strategy for *increasing* judicial review under the Clause—bifurcating the rigor of review, so it can be more strict for “proper”—is undermined. And a strategy for *decreasing* judicial review under the Clause—urging the courts to adopt a Thayerian approach because it is an empty delegation—is also undermined. The courts are left with the duty of making decisions about the powers that are incident to the enumerated powers. Or, to put the task in more famil-

³¹⁹ See Barnett, *The Original Meaning of the Necessary and Proper Clause*, *supra* note 194, at 209–10; Lawson & Granger, *supra* note 6, at 276–81. Similarly, other legal documents of the time included clauses that expressly gave an agent or fiduciary the power to determine what were incidental powers. See Miller, *supra* note 192. On “necessary and expedient” as a probable hendiadys, see *supra* note 242.

³²⁰ For example, in *The Federalist* No. 44, *supra* note 2, at 305, Madison raises the question: “If it be asked, what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning?” His answer has three parts. First, *contra* Manning, he says the Necessary and Proper Clause is no different in this regard than any other provision of the Constitution (“I answer the same as if they should misconstrue or enlarge any other power vested in them . . .”). Second, he looks to the President and the courts: “In the first instance, the success of the usurpation will depend on the Executive and Judiciary departments, which are to expound and give effect to the Legislative acts.” There is no tempering of this with talk of the clarity of the mistake or the egregiousness of the wrong. Finally, he looks to the people: “[A]nd in the last resort, a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.” See also *McCulloch*, 17 U.S. (4 Wheat.) at 423; *id.* at 358–59 (argument of Wirt); Lawson & Granger, *supra* note 6, at 280–85, 301–03. St. George Tucker also expressly recognizes both judicial enforcement and political safeguards in his discussion of the Necessary and Proper Clause, and like Madison as between these two he gives priority to judicial enforcement. See Tucker, *supra* note 262, at 288–89.

³²¹ H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 Mich. L. Rev. 651, 671–72 (1995) (“As an early nationalist judge wrote, ‘A comparison of the law with the constitution is the right of the citizen.’” (quoting *United States v. The William*, 28 F. Cas. 614, 615 (D. Mass. 1808) (No. 16,700))). As for the actual practice, see Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 Geo. L.J. 1257 (2009).

iar terms, courts must consider, as courts often do, the fit between an agent's prescribed ends and chosen means.

*G. Testing the Hypothesis: Two Case Studies
from Marshall's Defense of McCulloch*

In *McCulloch*, Chief Justice Marshall famously said that the means must be "appropriate" and "plainly adapted" to an end that is legitimately constitutional.³²² In his essays defending *McCulloch*, Marshall further discusses the analysis of incidental powers under the Clause with several hypothetical cases. By considering these essays here, I do not mean to suggest that Marshall in his extrajudicial writings can exert control over the meaning of *McCulloch*. The point is rather that "even authors can act as good readers of their own texts."³²³

When discussing these hypothetical cases, Marshall makes clear that he does not see the analysis of means and incidental powers as purely mechanical. There is an irreducibly evaluative element in the consideration of whether the chosen means were "appropriate."³²⁴ Responding to an example given by his interlocutor Amphictyon, Marshall describes a tenant at will who has a right to grow crops, and does grow crops, before being evicted. "To this right," Marshall says, "is annexed as a necessary incident, the power of carrying away the crop."³²⁵ And yet Marshall adds:

³²² *McCulloch*, 17 U.S. (4 Wheat.) at 421.

³²³ Umberto Eco, *Experiences in Translation* 62 n.1 (Alastair McEwen trans., 2001).

³²⁴ Marshall, *A Friend to the Union* No. 2, *supra* note 258, at 96.

³²⁵ *Id.* Marshall's example shows why "incidental powers" and "means" seem not to be fully interchangeable concepts—the carrying away is an incident of the growing, but it is not a means to the growing. Similarly, the power to declare war may carry with it, as an incident, the power to conclude a peace, see Natelson, *supra* note 311, at 63, but not even Clausewitz would call peacemaking a means for war. It may be that the incidental powers that *are* means are best supported by the Necessary and Proper Clause (they "carry into Execution"), while the incidental powers that are not means are best supported by the enumerated powers themselves. Compare Madison's statement that the meaning of the Necessary and Proper Clause is "limited to means *necessary* to the *end*, and *incident* to the *nature*, of the specified powers." Madison, *supra* note 228, at 372, 376. Note that Marshall did urge a sharp distinction between "incidental powers" and "means." John Marshall, *A Friend of the Constitution*, No. 2 (July 1, 1819), *reprinted in* Marshall's Defense, *supra* note 213, at 162–64; John Marshall, *A Friend of the Constitution*, No. 3 (July 2, 1819), *reprinted in* Marshall's Defense, *supra* note 213, at 171–74. This was in response to Roane's call for using only the former term. See Roane's "Hampden" Essays, No. 2 (June 15, 1819), *reprinted in* Marshall's Defense, *supra* note 213, at 122–24. There is a logic to Marshall's point, but it seems driven by

Undoubtedly the person allowed to carry away his crop, would not be permitted to throw down the fences, trample the enclosed fields, and trespass at will on the landholder. But he has a choice of “appropriate” means for the removal of his property, and may use that which he thinks best.³²⁶

In another example in the same essay, Marshall takes up an old hypothetical case—what if Congress imposed a land tax, and to make it easier to collect, prohibited the states from taxing land?³²⁷ Marshall said:

Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an “appropriate” means, or any means whatever, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means “plainly adapted,” or “conducive to” the end. The passage of such an act would be an attempt on the part of Congress, “under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the government.”³²⁸

This passage is striking, and it offers a way to test the diverging analytical pathways (though not diverging results) from a two-requirements reading and a hendiadic reading. Note how different the analysis of this hypothetical case would be under *Printz*, *Alden*, and *NFIB*. Under those precedents this would be an easy decision: the statute would be “necessary”—it would aid federal taxation—but it would not be “proper,” because the prohibition on state land taxes would fail to respect state sovereignty. In other words, if this case were decided today, the textual hook would be “proper” and the relevant language in *McCulloch* would be that the chosen means are “prohibited” and not “consist[ent] with the

tactics, because it conveniently let him sidestep some of Roane’s arguments. See Marshall, *A Friend of the Constitution*, No. 4 (July 3, 1819), *supra* note 213, at 177–78 (“Can he already have forgotten that all his quotations and all his arguments apply to ‘incidental’ or ‘additional’ powers, not to the *means* by which powers are to be executed?”). Ultimately, though, the claims that Roane and Marshall were making about terminology were not consistent with the earlier debates, as can be seen from the variegated language used by Madison in the debate over the First Bank of the United States. See *supra* text accompanying note 269.

³²⁶ Marshall, *A Friend to the Union* No. 2, *supra* note 258, at 96.

³²⁷ The hypothetical appears in both *Federalist* No. 33 (Hamilton) and in *A Virginian’s “Amphictyon” Essays*, No. 2 (Apr. 2, 1819), *supra* note 239, at 66–67.

³²⁸ Marshall, *A Friend to the Union* No. 2, *supra* note 258, at 100 (quoting *McCulloch*, 17 U.S. (4 Wheat.) 316).

letter and spirit of the constitution.”³²⁹ But Marshall never invokes “proper” as the ground of his objection, even though he manifestly objects to this intrusion on the reserved powers of the states. Nor is this because he is treating the policy choice as somehow ineffective or futile—to the contrary, he treats the policy choice of Congress as being in some constitutional sense *wrong*. And yet he does not attack it as “prohibited” or contrary to the Constitution’s “letter and spirit.” Rather, he treats the defect of the statute as something exposed through ordinary means-end analysis.³³⁰

This very passage from Marshall’s defense of *McCulloch* is quoted by Lawson and Granger. It is worth quoting at length their assessment of Marshall’s treatment of this hypothetical case, because it will show the perceptiveness of their analysis, but also what can be missed by not considering “necessary and proper” as a single unit of meaning:

If Chief Justice Marshall meant that such a law could not be an efficacious, and hence a “necessary,” means of fostering federal tax collection, he was so clearly wrong that the claim would be disingenuous. Nor could he plausibly claim that such a law was not linked to the execution of an enumerated power; the federal government is expressly given the power to levy taxes. If he were serious that such a law was not, and could not be, a constitutional exercise of the Sweeping clause power, he must have based that conclusion on something in the clause other than the word “necessary”—he must have meant that the law

³²⁹ See *United States v. Comstock*, 560 U.S. 126, 160–61 (2010) (Thomas, J., dissenting) (interpreting *McCulloch* as distinguishing between “necessary” and “proper”: “The means Congress selects will be deemed ‘necessary’ if they are ‘appropriate’ and ‘plainly adapted’ to the exercise of an enumerated power, and ‘proper’ if they are not otherwise ‘prohibited’ by the Constitution and not ‘[in]consistent’ with its ‘letter and spirit.’”) (quoting *McCulloch*, 17 U.S. (4 Wheat.) 316)); Somin, *supra* note 195, at 150–51.

³³⁰ For another instance of this approach, see St. George Tucker’s discussion of a hypothetical “law prohibiting any person from bearing arms, as a means of preventing insurrections.” Tucker, *supra* note 262, at 289. This is exactly the sort of thing that the analysis in *Printz* and *NFIB* might suggest was “necessary” but not “proper.” But Tucker says the courts “would be able to pronounce decidedly upon the constitutionality of these means” and they would do so “under the construction of the words necessary and proper.” *Id.* The same hypothetical case was discussed by Roane, and he reached a similar conclusion: disarming the people is not incidental to quelling insurrections. Roane’s “Hampden” Essays, No. 3 (June 18, 1819), *supra* note 213, at 134–35.

would not be “proper” because it would infringe on the protected rights of the states.³³¹

What is perceptive here is the recognition by Lawson and Granger that Marshall is not analyzing the statute in terms of effectiveness.³³² But Lawson and Granger have two buckets to put this analysis in—it can go in the effectiveness bucket (“necessary”), or it can go in the constitutional-principles bucket (“proper”). Since it doesn’t go in the first, it has to go in the second. But this is not how Marshall proceeds. He does not mention “proper”; *he* does not have two buckets.

Finally, note that Marshall clearly thinks that a court should strike down this statute as unsupported by the Necessary and Proper Clause (the “pretext” quote leaves no doubt, since that is what the quoted language meant in *McCulloch*). Thus Marshall is arguing that the Necessary and Proper Clause is judicially enforceable—that the language to this effect in *McCulloch* was not an empty platitude. And in this argument it is plain that he does not consider the only ground for such judicial action to be the positive violation of another constitutional provision. When a congressional act requires the support of the Necessary and Proper Clause, but receives none, that act is not constitutional.

And so we are back to *McCulloch*, a decision that protected the national government from an extremely rigorous interpretation of the Necessary and Proper Clause, but a decision that did not give Congress free rein.³³³ If “the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government,” then a court does not over-scrutinize the judgment of Congress.³³⁴ But the Court also said:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.³³⁵

³³¹ Lawson & Granger, *supra* note 6, at 306 (footnote omitted); see also Somin, *supra* note 195, at 149 (reaching the same conclusion).

³³² For arguments against seeing incidental-powers analysis primarily in terms of policy, see *supra* notes 301–05 and accompanying text.

³³³ Marshall, *A Friend to the Union* No. 2, *supra* note 258, at 91–105; see *supra* note 235.

³³⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 423.

³³⁵ *Id.*

CONCLUSION

Sometimes a familiar text needs to be reread. When it is, we may discover a seemingly new reading that has been there all along, hiding in plain sight. This Article has offered a new reading of two familiar Clauses of the Constitution. It is now common to read the Necessary and Proper Clause as authorizing congressional action only if it is both “necessary” and “proper” for carrying into execution an enumerated power. But reading the phrase “necessary and proper” as a hendiadys makes better sense of the text, the early history, and *McCulloch*. It is common now to read the text of the Cruel and Unusual Punishments Clause as prohibiting punishments only if they are both “cruel” and “unusual.” But this phrase, too, makes more sense when it is read as a hendiadys.

This reading of the Necessary and Proper Clause is a blow to a line of argument some Justices have been developing in *Printz*, *Alden*, and *NFIB*, a line of argument that lays great stress on the distinction between “necessary” and “proper.” Perhaps it is not a fatal blow. One might justify the conclusions from that line of argument on other grounds—free-standing structural principles, policy, or even a kind of hydraulic originalism that makes up for the loss of one original power or limit by developing another one.³³⁶ Some of the considerations in the Court’s recent cases about “proper” might rightly belong in the analysis of incidental powers.³³⁷ But those arguments would have to be developed, and they would need to stand on some firmer basis than the word “proper.” Another implication of the reading here is that there needs to be renewed attention to the closeness of the fit between an enumerated power and the congressional action that purports to be carrying it into execution.

For the Cruel and Unusual Punishments Clause, the reading here points in a different direction than the Supreme Court’s cases about “evolving standards of decency.” This reading would not help the Jus-

³³⁶ See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733 (2005). But cf. Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 Geo. Wash. L. Rev. 1161 (1998). A related but narrower question is whether it is important that *something* lies beyond federal power, even if the line being drawn is not itself otherwise persuasive. On that question in relation to the Necessary and Proper Clause, compare 1 Laurence H. Tribe, *American Constitutional Law* 798–99, 801–02 (3d ed. 2000), with Koppelman, *supra* note 196, at 115. More generally, see Powell, *supra* note 321; Richard Primus, *The Limits of Enumeration*, 124 Yale L.J. 576 (2014).

³³⁷ See *supra* Section III.G, especially the text accompanying notes 324–30.

tices eliminate a punishment they consider passé. What it would do is give them the grounds—and the duty—to stand up to democratic majorities that seek to punish with newfound cruelty. Moreover, reading “cruel and unusual” as a hendiadys casts doubt on two approaches to the Clause’s text. Some Justices, most often liberal ones, read out “unusual” and treat the Clause as requiring only an inquiry into what is “cruel.”³³⁸ But if the phrase is a hendiadys, “cruel” cannot be read alone. It must be read with “unusual.” Other Justices, most often conservative ones, argue that “cruel” and “unusual” are separate requirements.³³⁹ But they are not, if the phrase is a hendiadys.

This Article does not pretend to determine the exact construction that contemporary courts should give to these Clauses. The interpretations advanced here are persuasive, but not conclusive, and the only modalities of constitutional interpretation that have been considered in detail are text and history.³⁴⁰ There is more to constitutional law. Yet these readings do have implications. For example, if this reading of the text of the Necessary and Proper Clause were adopted, the textual support for some cases would be undermined, either because they depend on a reading of “proper” that is difficult or impossible to fold into means-end analysis (e.g., *NFIB*³⁴¹), or because they treat so cavalierly the fit between a statute and an enumerated power (e.g., *Wickard v. Filburn*³⁴²). Other cases might have their reasoning undermined but still be right on different grounds (e.g., *Printz*³⁴³).

This Article also speaks to the place of text in American constitutional discourse. Some consider these phrases to be crude, “inadvertent,”³⁴⁴

³³⁸ E.g., *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (“A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.”).

³³⁹ E.g., *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.).

³⁴⁰ An exception is *McCulloch*, but no attempt is made to align these readings with recent precedents.

³⁴¹ 132 S. Ct. 2566 (2012). If “proper” is not an independent requirement, the close fit between the individual mandate and the regulations of commerce in the Affordable Care Act would have made the mandate considerably less vulnerable to challenge.

³⁴² 317 U.S. 111 (1942). For *Wickard*’s treatment of the regulation of intrastate activity under the Necessary and Proper Clause, see Gardbaum, *supra* note 3, at 809.

³⁴³ 521 U.S. 898 (1997). The arguments made against commandeering under “proper” might well fit within an analysis of incidental powers, but any such effort would have to come to terms with the potent historical critique in Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 Yale L.J. 1104 (2013).

³⁴⁴ *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring) (“The use of the word ‘unusual’ in the final draft appears to be inadvertent.”).

even “constitutional stupidities.”³⁴⁵ But the readings here suggest something quite different. These Clauses are subtle, and they show an adroit recognition of the limits of language and the passage of time. It is not possible to fully specify the incidental powers of Congress; thus “necessary and proper.” Times change, and new occasions can bring new savagery; thus “cruel and unusual.”

What led to the rise of two-requirements readings of the Necessary and Proper Clause and the Cruel and Unusual Punishments Clause? Why do the readings that are given in this Article, which have affinity with older ones, seem so new? Only speculations can be offered. For legal rules this is an Age of Dissection. Equitable principles that were once overlapping and a bit inchoate are separated into a four-part test.³⁴⁶ Justiciability principles are fragmented.³⁴⁷ Phrases like “necessary and proper” and “cruel and unusual” get pulled apart. One might think that this tendency is aided and abetted (that is an alliterative repetition, not a hendiadys) by the rise of textualism and originalism. If so, the fault seems to lie with the friends and the foes of these approaches, for both too often present the reading of a text as a narrow, almost mechanical exercise.³⁴⁸ But a legal text cannot be read like a telegram—a word said, then “Stop,” then another word, then another “Stop.”

For some readers, this Article may seem destabilizing. If there was one word in the Constitution that you thought you knew the meaning of, it was *and*. But if that word turns out to contain significant ambiguity, what hope does the interpreter have? Other readers may be suspicious of what they regard as linguistic archaeology, an excavation to dig up new meanings that have lain below the surface of the constitutional text for centuries.³⁴⁹ But those concerns misconceive this project. It is true that the term *hendiadys* has not previously been applied to the Constitution. But it is just a term that enables us to recognize a semantic relationship that is common in many languages and texts. This figure of speech is

³⁴⁵ Graber, *supra* note 1.

³⁴⁶ See Mark P. Gergen, John M. Golden, & Henry E. Smith, The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203 (2012).

³⁴⁷ See Richard H. Fallon, Jr., The Fragmentation of Standing, 93 Tex. L. Rev. 1061 (2015).

³⁴⁸ See *supra* note 35.

³⁴⁹ Cf. Suzanna Sherry, Too Clever by Half: The Problem with Novelty in Constitutional Law, 95 Nw. U. L. Rev. 921 (2001).

one “we use without thinking and without naming.”³⁵⁰ Seeing these two constitutional phrases as examples of hendiadys does not give them meanings that are radical, unprecedented, or wide-open. In fact, reading “necessary and proper” and “cruel and unusual” as instances of hendiadys brings us closer to the understandings of the earliest interpreters.

³⁵⁰ Fowler’s Dictionary, *supra* note 40, at ix; see also 1 P. Vergili Maronis Opera, with a Commentary by John Conington 236, n.192 (2d ed., rev. and corrected, London, Whittaker and Co. 1865) (figures of speech such as hendiadys “are not so much rules which the poets followed, as helps devised by the grammarians for classifying the varieties of language in which the poets indulged”).